Supreme Court, U.S.
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No. 99-887

In the Supreme Court of the United States

RALPH RICHARDSON, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner is a legal permanent resident alien who was convicted in state court of a criminal offense involving cocaine, left the United States for a brief period, and then sought to return to the United States. Upon his return the Immigration and Naturalization Service (INS) commenced removal proceedings against him as an alien "seeking admission into the United States," within the meaning of 8 U.S.C. 1101(a)(13) (1994 & Supp. IV 1998), and charged him with inadmissibility based on his drug offense. The INS also placed petitioner in detention, the INS District Director declined to grant him parole, and an immigration judge held that, under 8 C.F.R. 236.1, he had no authority to grant bond, as petitioner was an alien seeking admission. The questions presented are:

1. Whether the district court had authority under 28 U.S.C. 2241 to review petitioner's claim that, as a matter of statutory interpretation, he is an alien in the United States, not an alien seeking admission into the United States, and therefore he is entitled to a bond hearing before an immigration judge.

2. Whether the district court had authority under 28 U.S.C. 2241 to review petitioner's claims that, because petitioner has been treated as an alien seeking admission into the United States and thereby denied a bond hearing before an immigration judge, petitioner has been deprived of his rights under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.

3. Whether petitioner was deprived of his rights under the Due Process Clause or the Excessive Bail Clause because the decision to detain him, and to deny him release pending the completion of his removal proceeding, was made

by an INS District Director (with the possibility of review by the Board of Immigration Appeals) rather than an immigration judge.

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OPINIONS BELOW

The decision of the court of appeals from which review is sought (Pet. App. 1-17) is reported at 180 F.3d 1311. An earlier decision of the court of appeals (Pet. App. 18-118) is reported at 162 F.3d 1338. The opinion of the district court (Pet. App. 122-135) is reported at 994 F. Supp. 1466. The report and recommendation of the magistrate judge (Pet. App. 136-149) is unreported. Reprinted in appendices to this brief are the initial decision of the immigration judge ordering petitioner deported (App., *infra*, 9a-11a), the decision of the Board of Immigration Appeals affirming that decision in part and remanding in part (App., *infra*, 12a-26a), the decision of the immigration judge on remand again ordering petitioner deported (App., *infra*, 28a-60a), and decisions of

the District Director declining to release petitioner (App., *infra*, 5a-6a, 7a-8a, 64a-65a).

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1999. A petition for rehearing was denied on August 25, 1999 (Pet. App. 176-177). The petition for a writ of certiorari was filed on November 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to the application and the constitutionality of interim provisions of new immigration laws, concerning the detention of lawful permanent resident aliens who were convicted of controlled substance offenses, left the United States for a brief trip abroad, and then sought to return to the United States. The statutes and regulations at issue here provide that such a criminal alien seeking to return may be treated as an "arriving alien" seeking admission into the United States, charged with inadmissibility (rather than deportability) in his removal proceedings, and placed in detention pending the outcome of the removal proceedings, with the opportunity to apply to the INS District Director for parole, but not a right to a bond hearing before an immigration judge (IJ). Also at issue in this case are new statutory provisions that significantly restrict and streamline the timing and availability of judicial review of legal and factual issues that may arise in such an alien's removal proceeding.

1. a. In 1996, the Immigration and Nationality Act (INA) was comprehensively revised by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009. IIRIRA eliminated the provisions under prior law for "deportation" proceedings (covering aliens already in the United States) and "exclusion" proceedings (covering aliens seeking to make an

entry into the United States), and instead created one new form of proceeding, known as "removal." See 8 U.S.C. 1229a (Supp. IV 1998).

IIRIRA did retain some distinctions in removal proceedings, however, based on whether the alien had been lawfully admitted into the United States. Aliens who have already been lawfully admitted in the United States may be removed from the United States if they are found to be "deportable" on one or more grounds. See 8 U.S.C. 1227(a) (1994 & Supp. IV 1998); 8 U.S.C. 1229a(a)(1) (Supp. IV 1998). Aliens seeking admission into the United States may be denied admission and removed if they are found to be "inadmissible" on one or more grounds. See 8 U.S.C. 1182(a) (1994 & Supp. IV 1998); 8 U.S.C. 1229a(a)(1) (Supp. IV 1998). The grounds of inadmissibility and deportability, although in large part overlapping, are not entirely coterminous. For example, an alien seeking admission may be deemed "inadmissible" if the immigration officer "knows or has reason to believe" that the alien "is or has been an illicit trafficker" in controlled substances, even if the alien has not actually been convicted of such drug trafficking. See 8 U.S.C. 1182(a)(2)(C) (1994 & Supp. IV 1998). There is no equivalent ground of "deportability" for an alien who has been lawfully admitted into the United States.

IIRIRA defines "admission" and "admitted" to refer to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (Supp. IV 1998). IIRIRA further provides that an alien lawfully admitted for permanent residence "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws" *except* under certain circumstances, including when the alien "has committed an offense identified in [8 U.S.C.] 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v) (Supp. IV 1998). Thus, a lawful permanent resident alien who has committed

a criminal offense covered by Section 1182(a)(2), and who leaves the country and thereafter seeks to return, is to be regarded as an alien "seeking an admission into the United States." See *In re Collado*, Int. Dec. No. 3333, at 5-6 (B.I.A. Feb. 26, 1998).

Some aliens who are removable (whether deportable or inadmissible) based on a criminal offense may apply to the Attorney General for discretionary relief from removal (known as "cancellation of removal" under the new terminology of IIRIRA). See 8 U.S.C. 1229b(a) (Supp. IV 1998). An alien who is removable based on a conviction for an "aggravated felony," however, is ineligible for cancellation of removal. 8 U.S.C. 1229b(a)(3) (Supp. IV 1998). The INA defines "aggravated felony" to include illicit trafficking in a controlled substance. 8 U.S.C. 1101(a)(43)(B).

b. In IIRIRA, Congress provided that an alien against whom removal proceedings are commenced may be detained pending a decision whether the alien is to be removed from the United States. 8 U.S.C. 1226(a) (Supp. IV 1998). IIRIRA further provides that any alien who is inadmissible or deportable because of certain kinds of criminal conduct (including an aggravated felony or controlled substance offense) must be detained without bond pending the outcome of the removal proceeding. 8 U.S.C. 1226(c)(1)(A) and (B) (Supp. IV 1998). When Congress enacted that mandatory detention provision in IIRIRA, however, it also authorized the Attorney General to postpone its final implementation for one or two years. See IIRIRA § 303(b)(2), 110 Stat. 3009-586. To address the possibility that the Attorney General might elect to do so, Congress enacted certain Transition Period Custody Rules (TPCR) to apply in the interim. See IIRIRA § 303(b)(3), 110 Stat. 3009-586 to 3009-587. The TPCR authorized the Attorney General to release from custody certain criminal aliens if they were "lawfully admitted to the United States" and satisfied the Attorney

General that they would not pose a danger to persons or property and would appear for removal proceedings. IIRIRA § 303(b)(3)(B)(i), 110 Stat. 3009-587. That discretionary relief from detention for aliens convicted of aggravated felonies and controlled substance offenses is available only to aliens taken into custody before or during the period in which the TPCR were in effect. After expiration of the TPCR, the mandatory-detention provision of Section 1226(c) applies to similar aliens who are released from criminal custody on or after the date that the TPCR expired. See IIRIRA § 303(b)(2), 110 Stat. 3009-586.[1]

The Attorney General exercised her authority to delay the final implementation of the permanent detention rules of IIRIRA for two years. She also promulgated regulations governing the detention of criminal aliens under the TPCR. Those regulations provided generally that, in the case of an

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[1] In our response to petitioner's prior certiorari petition, we informed the Court that, because the TPCR had expired, petitioner's detention was no longer governed by the TPCR, but was controlled by the mandatory-detention provisions of Section 1226(c), and petitioner's challenge based on the TPCR was therefore moot. See Gov't Br. at 14, *Richardson* v. *Reno*, 119 S. Ct. 2016 (1999) (No. 98-1361). After the Court remanded this case to the court of appeals, and indeed after the government filed its initial brief on remand in the court of appeals, but before the government filed its reply brief on remand, the INS reexamined its construction of the effective dates of Section 1226(c). The INS then concluded that Section 1226(c) applies only to aliens who are released from criminal detention and taken into INS custody after the expiration of the TPCR. See Gov't C.A. Supp. Reply Br. 4-6 (July 1999) (informing court of appeals of government's change in position); *In re Adeniji*, Int. Dec. No. 3417, at 8-12 (B.I.A. Nov. 3, 1999) (accepting INS position); IIRIRA § 303(b)(2), 110 Stat. 3009-586 ("the provisions of such [Section 1226(c)] shall apply to individuals released after such periods"). Because petitioner was taken into custody during the period of effectiveness of the TPCR, his current detention is not mandatory, but is governed by the Attorney General's general discretionary authority under Section 1226(a) to detain aliens who are placed in removal proceedings.

alien who had been lawfully admitted to the United States and was thereafter placed in detention pending his removal proceedings, the alien, after an initial custody determination made by an INS District Director, could apply to an IJ for release upon bond. 8 C.F.R. 236.1(d)(1). The TPCR regulations also provided, however, that an IJ would have no authority to cases involving "arriving aliens," 8 C.F.R. 236.1(c)(5)(i) (1998),[2] defined elsewhere in INS regulations to mean "an alien who seeks admission to * * * the United States * * * at a port-of-entry," 8 C.F.R. 1.1(q). "Arriving aliens," under the TPCR, could apply only to a District Director, not an IJ, for release on bond, and could appeal from an adverse decision of the District Director to the Board of Immigration Appeals (BIA). 8 C.F.R. 236.1(d)(1), (d)(2)(i) and (d)(3)(ii). Accordingly, since a lawful permanent resident alien who had been convicted of a criminal offense covered by Section 1182(a)(2), and who left the country and thereafter sought to return, was considered an "alien seeking an admission" (see pp. 3-4, *supra*), under the TPCR such an alien could apply only to the District Director (with subsequent appeal to the BIA), not to an IJ, for release from detention.

c. IIRIRA enacted significant changes to the provisions governing judicial review of removal proceedings. IIRIRA repealed former 8 U.S.C. 1105a (1994), which had governed judicial review of final orders of deportation and exclusion. 110 Stat. 3009-612. In its stead, Congress enacted a new 8 U.S.C. 1252 (Supp. IV 1998). Section 1252(a)(1) provides that "[j]udicial review of a final order of removal * * * is

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[2] Portions of 8 C.F.R. Part 236 were significantly revised in 1998. See 63 Fed. Reg. 27,449 (1998). The substance of the same restriction on the IJs' authority to review District Directors' custody determinations concerning arriving aliens under the TPCR remains in force at 8 C.F.R. 3.19(h)(1)(i)(B).

governed only by" the provisions of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. III 1997), which places exclusive review of final orders of certain agencies in the regional courts of appeals (and not the district courts). Section 1252(b)(9) underscores the exclusive authority of the courts of appeals in removal matters by providing that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9) (Supp. IV 1998). And Section 1252(g) further provides that, "[e]xcept as provided in this section [*i.e.*, Section 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]."

IIRIRA also imposed significant restrictions on the authority of the courts of appeals to review challenges to removal orders entered against certain classes of criminal aliens. In 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998), Congress provided that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain criminal offenses, including controlled substance offenses.[3]

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[3] Section 1252(a)(2)(C) built on similar provisions enacted in Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276-1277, and in Section 309(c)(4)(G) of IIRIRA, 110 Stat. 3009-626, which govern judicial review of final orders of deportation entered before the full effective date of IIRIRA, April 1, 1997. The government has argued that neither Section

2. Petitioner is a native and citizen of Haiti. He was admitted to the United States in 1968 as a lawful permanent resident. In 1990, he was convicted of violating Fla. Stat. Ann. § 893.135(1)(b)(3) (West 1990), which prohibits selling, purchasing, manufacturing, or delivering cocaine, and also prohibits "actual or constructive possession of 28 grams or more of cocaine." See App., *infra*, 22a. Petitioner was sentenced to five years in prison for the cocaine offense. Pet. App. 21.

On October 26, 1997, petitioner attempted to enter the United States after a two-day trip to Haiti. During petitioner's inspection for admission, he admitted to having been convicted on his cocaine offense, as well as other offenses. Petitioner was then detained. Pet. App. 123-124, 151. On the same day, the INS commenced removal proceedings against petitioner, charging him with inadmissibility under 8 U.S.C. 1182(a)(2)(A)(i)(I) and (II), (B) and (C) (1994 & Supp. IV 1998) (referring respectively to a conviction of a crime involving moral turpitude, a conviction of a controlled substance offense, multiple criminal convictions, and engaging in drug trafficking). App., *infra*, 1a-4a. On November 13, 1997, petitioner requested parole from the INS District Director. While that request was pending, petitioner also requested parole from an IJ. On November 24, 1997, the IJ concluded that he had no authority under the TPCR to grant petitioner parole pursuant to 8 U.S.C. 1182(d)(5) or release

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440(a) of AEDPA nor Section 309(c)(4)(G) of IIRIRA divested the courts of appeals of jurisdiction to review threshold questions of alienage and deportability to determine whether the preclusion of review provision in fact applies to a petition for review at hand, and that neither Section should be read to preclude the courts of appeals from entertaining constitutional challenges made by criminal aliens to the INA itself. We take a similar view of Section 1252(a)(2)(C), as added by IIRIRA. See Pet. App. 108-110 (court of appeals agreeing with that position in its prior decision in this case).

on bond, as petitioner was an "arriving alien," having been charged with inadmissibility based on criminal convictions and activity covered by Section 1182(a)(2). Pet. 7; Pet. App. 171-172. On December 4, 1997, the District Director also denied petitioner's request for parole. The District Director concluded, based on petitioner's convictions, that his release was not in the public interest, and that there were no humanitarian reasons for granting parole. App., *infra*, 5a-6a. Petitioner did not appeal to the BIA from the decision of either the IJ or the District Director.

3. On November 26, 1997, petitioner filed a petition for a writ of habeas corpus in district court. See Pet. App. 150-170. Petitioner alleged that, insofar as he was treated under the TPCR as an "arriving alien" seeking admission to the United States (and therefore not entitled to a bond hearing before an IJ) rather than a returning lawful permanent resident alien, the TPCR regulations were contrary to the "entry" doctrine of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). See Pet. App. 167.[4] He also contended that his treatment as an arriving alien under the TPCR violated equal-protection principles by creating a class of lawful permanent residents who are not afforded a hearing before an IJ because of their brief departure from the United States, while affording such a hearing to lawful permanent residents who have not departed the United States. *Id.* at 158. He further alleged that the denial of a bond hearing before an IJ and his detention without bail violated procedural due process, substantive due process, and the Excessive Bail Clause of the Eighth Amendment. *Id.* at 161-166.

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[4] Under *Fleuti*, which construed the term "entry" in the INA as it existed prior to IIRIRA, a permanent resident alien who made a brief, casual, and innocent trip abroad and then sought to return to the United States was deemed not to be seeking an "entry" into the country upon his return. See 374 U.S. at 451-461 (discussing 8 U.S.C. 1101(a)(13) (1958)).

On February 13, 1998, the district court granted the writ of habeas corpus and ordered a hearing to be held by an IJ on the issue whether petitioner was an "arriving alien." Pet. App. 122-135. The district court ruled that it had jurisdiction to entertain the claims in petitioner's habeas corpus petition. *Id.* at 125. (Although the district court did not cite a specific statutory provision for its jurisdiction, it presumably relied on the general federal habeas corpus statute, 28 U.S.C. 2241.) On the merits, the district court ruled that the regulations' treatment of criminal aliens such as petitioner as "arriving aliens" is contrary to the INA. The court concluded that, when Congress enacted IIRIRA, it did not intend to supersede the *Fleuti* rule, under which lawful permanent resident aliens returning to the United States from a brief, casual, and innocent trip abroad were not treated as aliens seeking entry into the United States. Pet. App. 132-134.

4. Respondents appealed the grant of habeas corpus to the court of appeals (which granted a stay of the district court's order pending appeal). On December 22, 1998, the court of appeals vacated the district court's order for lack of jurisdiction. The court of appeals ruled that 8 U.S.C. 1252(g) (Supp. IV 1998) had divested the district court of authority to hear petitioner's challenges under 28 U.S.C. 2241. Pet. App. 18-118.

After reviewing IIRIRA's far-reaching changes to the immigration laws (Pet. App. 28-56), the court concluded that Section 1252(g) is "plain and clear" and "provides for judicial review for aliens only in the court of appeals and only after a final removal order." *Id.* at 60. The court rejected petitioner's reliance on the rule against repeals of habeas corpus jurisdiction by implication, concluding that Section 1252(g) was phrased sufficiently broadly to include a bar to review by way of habeas corpus. *Id.* at 63-64. The court also rejected petitioner's argument that Section 1252(g) "affects

only final removal orders" and does not address "interim detention orders" such as those denying bond and parole. *Id.* at 63 n.100.

The court of appeals then rejected petitioner's contention that the elimination of the district court's habeas jurisdiction over his claim would contravene the Due Process Clause, Article III, and the Suspension of Habeas Corpus Clause. Pet. App. 65-88. The court concluded that, although Section 1252(a)(2)(C) had imposed significant restrictions on the court of appeals' review of challenges to removal orders entered against criminal aliens, the judicial review remaining available to an alien in petitioner's position on such a petition for review (see pp. 7-8 n.3, *supra*) is a constitutionally sufficient alternative to habeas corpus. Pet. App. 108-109.

The court also rejected (Pet. App. 76) petitioner's argument that limiting his opportunity to request bond to a written submission to the INS District Director rather than providing a hearing before an IJ deprived him of due process. The court further held (*id.* at 77 n.119) that "Congress acts well within its plenary power in mandating detention of a criminal alien with an aggravated felony conviction facing removal proceedings," and that mandatory detention "poses no constitutional issue." *Ibid.* (citing *Carlson* v. *Landon*, 342 U.S. 524, 545 (1952) (ellipsis and internal quotation marks omitted)).

5. Petitioner filed a petition for a writ of certiorari. While that petition was pending, this Court decided *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). In *AADC*, the Court rejected a broad reading of Section 1252(g) as covering "all deportation-related claims," *id.* at 478, and instead construed that Section to cover only "three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at

482 (quoting Section 1252(g); emphasis added in *AADC*). The Court contrasted Section 1252(g) with Section 1252(b)(9), which it described as an "unmistakable 'zipper' clause," channeling into the courts of appeals all issues arising from any actions taken or proceedings brought to remove alien from the United States. *Id.* at 483. Because this Court's decision in *AADC* superseded the Eleventh Circuit's construction of Section 1252(g), the government urged the Court to grant petitioner's certiorari petition, vacate the decision of the court of appeals, and remand the case for further consideration in light of *AADC*. The Court disposed of the petition in that manner on June 1, 1999. 119 S. Ct. 2016 (1999); Pet. App. 173.

6. On remand from this Court, the court of appeals again concluded that the district court lacked jurisdiction over petitioner's claims under 28 U.S.C. 2241, but it based its conclusion principally on Section 1252(b)(9), rather than Section 1252(g). Pet. App. 1-17. The court stated that Section 1252(b)(9) provides "clear evidence of Congress' desire to abbreviate judicial review to one place and one time: only in the court of appeals and only after a final removal order and exhaustion of all administrative remedies." *Id.* at 6 (internal quotation marks and brackets omitted). Thus, the court ruled, "[j]udicial review of the issues raised in [petitioner's] § 2241 petition must await a final BIA removal order and can occur in the court of appeals through a petition to review that final order." *Id.* at 8.

The court again concluded that IIRIRA's limitation on district court habeas corpus jurisdiction under 28 U.S.C. 2241 is not unconstitutional on its face or as applied to petitioner. Pet. App. 9. The court observed that Section 1252(a)(2)(C) "does not remove all judicial review" for criminal aliens, and that at a minimum, judicial review remains available after entry of a final removal order "to determine if the specific conditions exist that bar jurisdiction in the court

of appeals." *Ibid.* Moreover, after entry of a final removal order, the court of appeals could then consider whether that remainder of judicial review satisfies the Constitution; if not, petitioner could then pursue "adequate and effective judicial review of statutory and constitutional issues" in the court of appeals, pursuant to Section 1252(b)(2) and (b)(9). *Ibid.*

The court also rejected petitioner's argument that claims challenging detention fall outside the scope of Section 1252(b)(9). Pet. App. 12-13. The court observed that petitioner's claims involve "mainly whether the INS properly detained Richardson as an 'arriving alien' and whether the denial of bond and parole by the INS District Director, without a subsequent individualized hearing before an Immigration Judge, violated Richardson's constitutional rights." *Id.* at 13. The court ruled that those claims fall within Section 1252(b)(9) because that Section "is not limited to any particular form of proceeding; rather it applies to 'any action taken or proceeding brought to remove an alien.'" *Id.* at 15 (quoting Section 1252(b)(9)). "Any action taken" to remove an alien, the court held, "encompasses detention as the first step in the removal process." *Id.* at 15-16.

7. While the government's initial appeal to the court of appeals was pending, on January 8, 1998, an IJ found petitioner inadmissible pursuant to 8 U.S.C. 1182(a)(2)(A)(i)(I) (conviction of crime involving moral turpitude), 1182(a)(2)(A)-(i)(II) (conviction of controlled substance offense), and 1182(a)(2)(C) (Supp. IV 1998) (engaging in drug trafficking). The IJ also found petitioner statutorily ineligible for cancellation of removal based on the conclusion that his cocaine offense was an aggravated felony. Petitioner was ordered deported to Haiti. App., *infra*, 9a-10a.

On May 5, 1999, the BIA affirmed the IJ's decision in several respects, but sustained petitioner's appeal on one issue, and remanded the case for further proceedings. Among other things, the BIA concluded that petitioner was indeed

an "alien seeking admission" under 8 U.S.C. 1101(a)(13) (Supp. IV 1998). App., *infra*, 18a-20a. Relying on its decision in *In re Collado*, *supra*, the BIA ruled that IIRIRA had repealed the "entry" doctrine as articulated in *Fleuti*, and replaced the concept of "entry" with a new definition of "admission." Under the new "admission" definition, a lawful permanent resident who was convicted of a criminal offense, leaves the United States, and seeks to return is "to be regarded as an alien seeking admission into the United States, without further inquiry into the nature and circumstances of a departure from and return to this country." *Id.* at 19a. Since petitioner had been convicted of a controlled substance offense covered by Section 1182(a)(2), the BIA concluded that he "is to be regarded as an alien seeking admission." *Ibid.*

The BIA agreed with petitioner, however, that there was insufficient evidence to conclude that the controlled substance offense of which he was convicted constituted an aggravated felony, barring him from eligibility for the discretionary relief of cancellation of removal. The BIA observed that the Florida statute under which petitioner was convicted reached both trafficking offenses such as sale of cocaine, and also simple possession of more than 28 grams of cocaine, which would not be an aggravated felony under the INA if it was a first offense. The BIA remanded the case to the IJ on this issue, and expressly held that the INS was not precluded from adducing additional evidence to demonstrate that petitioner was convicted of an aggravated felony. App., *infra*, 20a-25a.

On remand, the IJ initially concluded that petitioner had not been convicted of an aggravated felony and was therefore eligible for cancellation of removal (see App., *infra*, 27a), but on November 15, 1999, after taking additional evidence, the IJ reversed himself and concluded that petitioner was

indeed an aggravated felon (*id.* at 34a-36a).[5] The IJ also determined that petitioner should not be granted cancellation of removal as a matter of discretion. *Id.* at 37a-60a. The IJ therefore again ordered petitioner deported. *Id.* at 60a. Petitioner's appeal from the IJ's decision is currently pending before the BIA.[6]

ARGUMENT

Petitioner urges the Court to decide whether the court of appeals erred in concluding that the district court lacked jurisdiction under 28 U.S.C. 2241 to entertain his statutory and constitutional claims arising out of the Attorney General's decision to treat him as an "arriving alien," and thereby not to afford him the opportunity for a bond hearing before an IJ that is afforded to aliens in the United States who were convicted of similar crimes. Petitioner also challenges that decision on the merits. The specific claims raised by petitioner, however, have little prospective significance, because, for purposes of detention, the distinction under the TPCR between legal permanent aliens convicted of drug offenses who are seeking to return to the United States and similar aliens placed in removal proceedings in the United

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[5] The IJ relied on Eleventh Circuit case law to the effect that a conviction for possession of a controlled substance, if punished as a felony under state law, is deemed an aggravated felony. See App., *infra*, 35a-36a; *United States* v. *Simon*, 168 F.3d 1271 (11th Cir.), cert. denied, 120 S. Ct. 114 (1999). The BIA had previously declined to follow the *Simon* decision. App., *infra*, 24a-25a. The IJ also relied on other circuit case law to the effect that possession of an amount of cocaine too large for personal use may be considered illicit trafficking and therefore treated as an aggravated felony. *Id.* at 35a.

[6] Petitioner also made a new request to the District Director for release on bond. The District Director initially decided that petitioner should be released on a $25,000 bond, App., *infra*, 61a-64a, but a few days later, after receiving additional information about petitioner's convictions, revoked petitioner's bond, *id.* at 65a.

States has expired. After expiration of the TPCR, both classes of criminal aliens are now covered by the mandatory detention provisions of 8 U.S.C. 1226 (Supp. IV 1998). While the INA does continue to make distinctions between arriving aliens and aliens placed in removal proceedings in the United States for purposes of detention, this case does not raise those issues. In addition, the court of appeals' jurisdictional decision is correct and does not conflict with any decision of another court of appeals or this Court. Petitioner's arguments on the merits of his claims were not addressed by the court of appeals, and in any event are incorrect. Further review is therefore not warranted.

1. Petitioner's claims ultimately derive from the fact that, as a legal permanent resident alien who sought to return to the United States and was charged with inadmissibility based on Section 1182(a)(2), he was treated as an "arriving alien," was placed in detention, and under the TPCR, was limited to requesting parole from the District Director rather than bond from an IJ. Petitioner observes that if he had been placed in removal proceedings in the United States, he would have had the opportunity for a bond hearing before an IJ. For the purpose of detention of criminal aliens pending their removal proceeding, however, that distinction has little ongoing relevance. The distinction was pertinent to petitioner's detention because the Attorney General elected to postpone the operation of the permanent mandatory-detention provisions of Section 1226(c) and to proceed for a two-year period under the TPCR, which gave immigration authorities (whether a District Director or an IJ) discretion to release aliens charged with inadmissibility or deportability based on drug offenses.

That discretion no longer exists in the cases of many criminal aliens released from criminal detention and taken into INS custody after expiration of the TPCR (with

exceptions not pertinent here),[7] whether or not the alien is returning from a trip abroad. Under Section 1226(c)(1), the Attorney General "shall take into custody" any alien who is inadmissible based on Section 1182(a)(2) (which covers the cocaine conviction forming one of the bases of petitioner's removal proceeding) or who is deportable by reason of having been convicted of one of various crimes, including any controlled substance offense. See 8 U.S.C. 1226(c)(1)(A) and (B) (Supp. IV 1998). Thus, if petitioner were released from criminal custody today, and removal proceedings were then commenced against him, now that the TPCR expired, he would be subject to mandatory detention under Section 1226(c)(1) because of his cocaine conviction, whether he was in the United States or was instead seeking to return from a trip abroad.[8]

For purposes of the detention of criminal aliens, therefore, the distinction between "arriving aliens" and those placed in removal proceedings in the United States has lost much of its significance.[9] That is not to say that the distinction has

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[7] Under the permanent detention provisions, the Attorney General may release a criminal alien (whether deportable or inadmissible) covered by Section 1226(c) in order to provide protection to a person such as a witness or cooperating individual. See 8 U.S.C. 1226(c)(2) (Supp. IV 1998). Petitioner has not asserted that his release could be justified on such a basis.

[8] As we have explained above (p. 5 n.1, *supra*), the mandatory-detention provision of Section 1226(c) applies only to aliens released from custody after expiration of the TPCR. Petitioner's detention is therefore not covered by Section 1226(c). Accordingly, this case does not present an appropriate occasion to consider any issues that might arise concerning the applicability or constitutionality of mandatory detention under Section 1226(c)(1).

[9] Aliens other than criminal aliens may also be detained in the discretion of the Attorney General, pending the outcome of their removal proceedings. See 8 U.S.C. 1226(a) (Supp. IV 1998). For non-criminal aliens, the distinction between "arriving aliens" and other aliens retains

lost significance for all purposes. The removal of "arriving aliens," including aliens such as petitioner, continues to be governed by the standards of inadmissibility in Section 1182, whereas the removal of aliens who have been admitted and are in the United States continues to be governed by the standards of deportability in Section 1227. Moreover, petitioner has been charged with grounds of inadmissibility, not deportability. See App., *infra*, 3a-4a. One of the grounds of inadmissibility against petitioner, based on Section 1182(a)(2)(C), has no precise analogue under Section 1227, and the IJ found petitioner inadmissible on that basis (among others). See App., *infra*, 10a, 60a.

Petitioner has the opportunity in his removal proceedings, however, to contest the charge that he is "inadmissible" as an "arriving alien." Indeed, he raised that contention on his previous appeal to the BIA, which rejected it based on its decision in *In re Collado*, *supra*. See App., *infra*, 19a-20a. In addition, in our view, petitioner will be able to raise that argument in a petition for review of any final removal order in the court of appeals. The court of appeals will not be precluded from considering it under Section 1252(a)(2)(C), because that issue goes to an element of the threshold question whether his criminal offense is "covered in section 1182(a)(2)," and therefore whether the statutory jurisdictional bar therefore applies to his case. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) (precluding judicial review of "any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2)"). There accordingly would be no occasion

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significance for purposes of detention, because an IJ may not review a District Director's custody determination concerning an arriving alien placed in removal proceedings. See 8 C.F.R. 3.19(h)(2)(i)(B). Because petitioner is a criminal alien who would be subject to mandatory detention under Section 1226(c) had he been released from criminal detention after expiration of the TPCR, that distinction has no pertinence to this case.

for the Court in this case, in its present posture, to address whether the Attorney General has properly concluded that legal permanent resident aliens convicted of criminal offenses covered in Section 1182(a)(2) who leave the United States and seek to return should be treated as "arriving aliens." Because the merits of all of petitioners' claims either have little ongoing significance in the detention context or may be resolved later on review of a final order of removal, this Court's review is not warranted.

2. The court of appeals concluded that the district court lacked jurisdiction under 28 U.S.C. 2241 to entertain petitioner's challenges to the Attorney General's decision to treat him as an arriving alien—which meant, among other things, that petitioner was not afforded a bond hearing before an IJ. That jurisdictional ruling does not warrant this Court's review.

a. Contrary to petitioner's contention (Pet. 15-17), the court of appeals' decision does not conflict with *Parra* v. *Perryman*, 172 F.3d 954 (7th Cir. 1999), or *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791. *Parra* presented a challenge to the constitutionality of IIRIRA's mandatory-detention provision, Section 1226(c)(1), not the validity of the Attorney General's decision to classify aliens like petitioner as "arriving aliens." The Seventh Circuit concluded that neither Section 1226(e) nor Section 1252(g) precluded district court jurisdiction to entertain challenges to the constitutionality of Section 1226(c)(1) itself, "as opposed to decisions implementing that subsection." 172 F.3d at 957. In this case, by contrast, most of petitioner's claims proceed from the premise that the Attorney General incorrectly decided to apply one regime rather than another to his case. Nor did the Seventh Circuit address Section 1252(b)(9), on which the court of appeals principally relied in this case to conclude

that the substance of petitioner's claims could be entertained on a petition for review of a final removal order.

Zadvydas presents a constitutional challenge to the INS's continued detention of an alien, *after* entry of a final order of deportation against him, because no other country would agree to accept the alien. The Fifth Circuit held that Section 1252(g) did not preclude the district court from entertaining a challenge to that detention on habeas corpus; it did not address Section 1252(b)(9). 185 F.3d at 285. In that case, however, the alien's constitutional claim necessarily could not have been covered by Section 1252(b)(9), because while Section 1252(b)(9) requires the consolidation of all legal and factual questions arising out of the alien's removal proceedings in one petition for review of the final order of removal, the alien was challenging only his detention *after* entry of his final order of deportation. Questions arising out of the alien's detention after the removal proceeding and any judicial review thereof have been completed do not implicate the "zipper clause" of Section 1252(b)(9).[10]

b. The court of appeals correctly concluded that Section 1252(b)(9) precludes district court review (even under 28 U.S.C. 2241) of petitioner's specific challenges to his detention. Section 1252(b)(9) provides:

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[10] Petitioner also suggests (Pet. 16-17) that the decision below conflicts with decisions of several circuits holding that AEDPA and the provisions of IIRIRA governing deportation cases commenced before April 1, 1997, did not withdraw the district courts' authority to entertain statutory and constitutional challenges to deportation orders under 28 U.S.C. 2241. As petitioner notes (Pet. 16-17), however, those decisions did not involve detention issues under the new permanent removal provisions of IIRIRA, and therefore have little relevance to this case. This Court recently denied review of a petition directly raising the issue of the district courts' authority under Section 2241 to entertain such challenges. See *LaGuerre v. Reno*, No. 99-418 (Feb. 22, 2000).

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under [Section 1252].

8 U.S.C. 1252(b)(9) (Supp. IV 1998). That capacious language captures the claims raised by petitioner. Petitioner has claimed (Pet. App. 167) that he is not an "arriving alien" under the INA, and therefore the INS may not charge him as "inadmissible" under Section 1182; rather, he must be charged as a "deportable" alien under Section 1227. Petitioner has also contended (*id.* at 158-161) that, if the INA does treat him as an "arriving alien," then the INA violates equal protection by distinguishing him from legal permanent resident aliens who have not left the United States.[11] Those claims go directly to the question whether petitioner is removable under the theories put forth by the INS in his removal proceeding. Petitioner may raise those objections in his removal proceedings and on a petition for review, and should the court of appeals agree with petitioner that the

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[11] Petitioner argues (Pet. 19-22) that Section 1252(b)(9) does not preclude the district court from deciding whether principles of procedural due process, substantive due process, or the Excessive Bail Clause require that an IJ, rather than the District Director, determine whether he should be detained pending the outcome of his removal proceeding. Those arguments, however, are necessarily derivative of petitioner's claim that he should not be treated as an "arriving alien" under the INA; petitioner argues that the Attorney General erred in assigning him to the class of arriving aliens, and that he should be afforded the greater procedural rights appropriate to his allegedly proper status. See Pet. 22 (petitioner "challenges solely the constitutionality of depriving lawful permanent residents of their right to a bond hearing *merely because of a regulatory characterization* that they are seeking entry") (emphasis added).

INA or the Constitution precludes him from being removed as an inadmissible arriving alien, then any removal order entered against him on that basis will be overturned.

Petitioner argues (Pet. 22), however, that Section 1252(b)(9) does not expressly reach *detention* decisions, and therefore a district court may decide whether the INS's decision to detain him as an inadmissible alien comports with the INA and the Constitution. That argument, however, misapprehends the nature of the INS's decision to detain an alien at the commencement of his removal proceeding, as authorized by Section 1226 and the TPCR. In detaining such an alien, the INS does not make a definitive, conclusive determination that the alien is in fact inadmissible; that determination is made in the alien's removal proceeding. Rather, when the INS detains an alien under Section 1226, it does so because there is "reason to believe" the alien is inadmissible or deportable on a certain ground. See *In re Joseph*, Int. Dec. No. 3387, at 9-10 (B.I.A. Apr. 23, 1999); 63 Fed. Reg. 27,444-27,445 (1998); cf. *Reno* v. *Flores*, 507 U.S. 292, 313 (1993) (noting that, in deciding whether to detain a juvenile alien, the INS asks: "Is there reason to believe the alien deportable?"). The INS determines whether the documents and materials supporting the charge of inadmissibility or deportability on their face establish that the alien falls within a category of aliens who should be detained.[12] In this case, the record of petitioner's conviction and the information supplied by petitioner to the INS officer when he sought

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[12] The alien may appeal the District Director's detention decision to the BIA, however, and the BIA may elect to make a de novo determination whether the alien is in fact inadmissible, if the record will support such a determination. Cf. *In re Joseph*, Int. Dec. No. 3398, at 7-8 (B.I.A. May 28, 1999) (explaining BIA's role on INS's appeal from IJ's detention decision). In addition, if after the removal proceeding the IJ determines that the alien is not removable, the IJ may order the alien released from detention, subject to the INS's right to appeal to the BIA. See *id.* at 8.

to return to the United States facially indicated that petitioner was inadmissible, and therefore provided the INS with sufficient warrant to detain him pending the completion of his removal proceeding.

Petitioner, however, seeks to have the federal courts make a definitive determination *now* as to whether he is an "arriving alien" under the INA (or may be validly treated as such under the Constitution), even though his removal proceedings have not been completed. It is implausible that the Congress that enacted Section 1252 also intended that the federal courts would make such a determination while removal proceedings are still pending. If the courts were to determine, in the context of review of a detention decision, that as a matter of statutory or constitutional interpretation petitioner may not be treated as an arriving alien, then petitioner's removal proceeding would have to be terminated before its completion, because the same legal questions would govern petitioner's removability. In effect, petitioner's construction of Section 1252(b)(9) would allow aliens who are detained under Section 1226, pending the completion of their removal proceedings, to make collateral attacks on those proceedings. That construction is contrary to Congress's intent in Section 1252 to limit "the deconstruction, fragmentation, and hence prolongation of removal proceedings." *AADC*, 525 U.S. at 487.[13]

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[13] Petitioner also argues (Pet. 21 & n.17) that the court of appeals' reading of Section 1252(b)(9) renders superfluous Section 1226(e), which separately precludes judicial review of the merits of the Attorney General's detention decisions. That argument is incorrect. The channeling of review in Section 1252(b)(9) precludes a district court (but not the court of appeals, on petition for review) from deciding, on habeas corpus, legal and factual questions that would bear on the merits of the alien's removal proceeding, even if they arise in the detention context. Section 1226(e) separately precludes judicial review by any court of detention decisions

c. Petitioner argues (Pet. 19-21) that the decision below conflicts with *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), which disapproved repeals by implication of habeas corpus jurisdiction. That doctrine has no application to this case, for the ouster of the district courts' authority to entertain petitioner's claims is clear and express. As the court of appeals explained (Pet. App. 8-9), the "unmistakable zipper clause" of Section 1252(b)(9), displacing from the district courts all claims that might arise in a removal proceeding and channeling them to the courts of appeals, makes sufficiently clear that Congress has replaced review under 28 U.S.C. 2241 with another regime for review of all statutory and constitutional issues that arise in removal proceedings. Cf. *Swain* v. *Pressley*, 430 U.S. 372 (1977).[14] Section 1252(b)(9) does not refer to Section 2241 or to habeas corpus *in haec verba*, but this Court has never held that statutory recitation of certain

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that might not bear directly on the alien's removability, such as whether the alien merits discretionary release on bond.

Moreover, not every claim concerning an alien's detention (even pending his removal proceeding) is necessarily shielded from review by either Section 1226(e) or Section 1252(b)(9). For example, a claim that mandatory detention under Section 1226(c) is facially unconstitutional is reviewable on habeas corpus. See *Parra*, *supra*. A claim that INS detention was based on a constitutionally impermissible factor such as race would also be reviewable on habeas corpus. Cf. *Jean* v. *Nelson*, 472 U.S. 846 (1985). Such claims do not go the merits of the alien's removal proceeding.

[14] In this respect, it is useful to contrast Section 1252 with old Section 1105a(a)(10), before it was amended by AEDPA. Before AEDPA, Congress had expressly preserved at least some access to habeas corpus in district court. See 8 U.S.C. 1105a(a)(10) (1994). In Section 401(e) of AEDPA, however, Congress repealed Section 1105a(a)(10), in a provision entitled "Elimination of Custody Review By Habeas Corpus." 110 Stat. 1268.

words is necessary to find a replacement of habeas corpus with another regime of judicial review.

Nor, contrary to petitioner's contention, does the court of appeals' construction of Section 1252 raise any serious issue under the Suspension of Habeas Corpus Clause. Petitioner argues (Pet. 23) that the Constitution requires that he have the opportunity to test the legality of his detention *before* completion of his removal proceeding. Thus, he maintains, he must be given the opportunity *now* to argue to the federal courts that he is not properly classed as an arriving alien. But as we have explained, the question for the INS in detaining petitioner at the commencement of his removal proceeding (and, therefore, the question whether petitioner's detention is proper) is not whether he is an inadmissible arriving alien but whether there is *reason to believe* that he is an inadmissible arriving alien. See pp. 22-23, *supra*. The INS clearly has reason to believe that petitioner is an inadmissible arriving alien, for petitioner was convicted of an offense that appears on its face to be an aggravated felony (indeed the IJ has concluded that it was an aggravated felony, see pp. 14-15, *supra*), and both the INA and the Attorney General's regulations on their face appear to require that a legal permanent resident alien convicted of an aggravated felony who seeks to return to the United States from abroad may be placed in detention, and that only the District Director has the authority to release him (subject to review by the BIA). See pp. 4-6, *supra*. This is not a situation in which the INS has detained someone wholly without warrant, or without any reason to believe that removal proceedings have been commenced against the alien on a proper basis.

3. Petitioner also seeks this Court's review (Pet. 25-30) of the merits of his claims that the INA and the Constitution prevent the Attorney General from treating him as an alien seeking admission to the United States, and denying him the

opportunity for a bond hearing before an IJ that is afforded lawful permanent resident aliens placed in removal proceedings in the United States. Because the court of appeals concluded in the decision under review that it lacked jurisdiction of this case, it did not reach the merits of those claims, and so this case would be an inappropriate vehicle for resolution of those claims.[15] Moreover, as we have explained, the court of appeals' jurisdictional ruling was correct. In any event, petitioner's claims are without merit.

Petitioner first argues, based on *Fleuti*, *supra*, and *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), that the INS may not treat him differently than a lawful permanent resident alien who never left the United States, and that he is therefore entitled to all the process afforded to such a lawful permanent resident alien. Neither *Fleuti* nor *Chew* held, however, that as a *constitutional* matter, Congress *must* afford lawful permanent resident aliens who are returning to the United States the same procedural rights afforded such aliens present here. In *Chew*, the Court held that a regulation permitting the detention and exclusion of aliens without any hearing did not apply to lawful permanent resident aliens returning to the United States. *Id.* at 602-603; see also *Landon* v. *Plasencia*, 459 U.S. 21, 31 (1982) (describing reasoning of *Chew*). The Court also stated in *Chew* that the alien was "entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated." 344 U.S. at 600. There is no dispute here, however, that petitioner is entitled to due process, even if he is treated as an arriving alien. See *Plasencia*, 459 U.S. at 31-33. The Constitution itself, however, does not

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[15] The court did discuss the merits of those claims in its previous decision, but only in passing and in language that is clearly dictum. See Pet. App. 74-75.

prevent either Congress or the INS from treating even lawful permanent resident aliens returning to the United States differently from those placed in deportation proceedings here, as long as they are afforded due process.

Fleuti also was not a constitutional holding. See 374 U.S. at 451 (addressing statutory question to avoid constitutional issue reached by lower court). There, the court concluded that the INA's definition of an alien seeking to make an "entry" into the United States did not reach a permanent resident alien who had left the United States briefly but had no "intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Id.* at 462. *Fleuti*, however, was superseded as a matter of statutory interpretation in IIRIRA, which abolished the "entry" doctrine and replaced it with the concept of "admission." Moreover, IIRIRA expressly provided that a lawful permanent resident alien who had been convicted of an offense covered in Section 1182(a)(2), and who left the United States and sought to return, should be treated as an alien seeking admission. See *Collado*, *supra*, Int. Dec. No. 3333, at 5-6. Nor can there be any question of Congress's constitutional authority to classify such an alien as one seeking admission, as long as the alien is provided due process in his removal proceeding when he seeks to return. See *Plasencia*, 459 U.S. at 31.

The procedures surrounding the District Director's decision to detain or release an alien such as petitioner comport with constitutional requirements. The District Director first determines, as we have explained (p. 22, *supra*), whether the INS has "reason to believe" that the alien is inadmissible as an arriving alien convicted of an offense covered by Section 1182(a)(2). See IIRIRA § 303(b)(3)(A)(ii), 110 Stat. 3009-587. That decision can be made on the basis of a review of the records of petitioner's conviction. In addition, the District Director may release the alien only if the alien establishes

that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." See IIRIRA § 303(b)(3)(B)(i), 110 Stat. 3009-587. Due process does not require that such a determination be made by an IJ after taking oral testimony. The District Director can consider any information brought to his attention by the alien. The alien may also appeal the District Director's detention decision to the BIA, which is independent of the INS.[16]

We also observe that the only court of appeals that has addressed the matter has upheld *mandatory* detention under Section 1226(c) of certain aliens, including those (like petitioner) charged with removal based on an aggravated felony conviction. See *Parra*, 172 F.3d at 958. An alien found removable based on an aggravated felony conviction is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. IV 1998). As the court observed in *Parra*, "[b]efore the IIRIRA bail was available to [aliens] as a corollary to the possibility of discretionary relief from

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[16] Petitioner's attempt (Pet. 26-27) to rely on *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), falls wide of the mark. In that case, the Court held that Congress had required that deportation hearings conform to the provisions of the Administrative Procedure Act (APA) requiring separation of prosecutorial and adjudicative functions. That case involved a hearing on the merits of the deportation charge, not a decision on the question whether the alien should be held in interim detention. Moreover, that decision was superseded by the Immigration and Nationality Act of 1952, which made the APA's separation-of-functions provision inapplicable to deportation hearings, and permitted a " 'special inquiry officer' to take the dual role of prosecutor and hearing officer," subject to the supervision of the INS District Director. See *Marcello* v. *Bonds*, 349 U.S. 302, 305 (1955); see also *id.* at 311 (upholding that practice against due process challenge). Finally, the alien can appeal the District Director's detention decision to the BIA, which is independent of the INS. That avenue of appeal ensures that the alien has access to whatever standards of impartiality might be required by the Constitution.

deportation; now that this possibility is so remote, so too is any reason for release pending removal." *Parra*, 172 F.3d at 958. But if the Constitution does not require that an alien charged with removal based on an aggravated felony conviction be given individualized consideration *at all* of a request for release pending the outcome of his removal proceeding (since mandatory detention of such an alien is constitutional), *a fortiori* it does not require that any such individualized consideration that is available be assigned to an IJ rather than the District Director, with review by the BIA. And the Constitution permits Congress to authorize detention, pending removal, of aliens based on the particular charge of removability against the alien, without the need for a factual showing that a particular alien who falls within that class would either fail to appear for the removal hearing or would cause specific harm to the community if released. See *Carlson* v. *Landon*, 342 U.S. 524, 534, 541 (1952).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
ERNESTO H. MOLINA, JR.
Attorneys

FEBRUARY 2000

APPENDIX

U.S. Department of Justice
Immigration and Naturalization Service **Notice to Appear**

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: *A 17 566 876*

In the Matter of:

Respondent: *RICHARDSON, RALPH* currently residing at: *[REDACTED]*
(Number, street, city, state, and ZIP code)
[REDACTED]
(Area code and phone number)

☒ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1. Are not a citizen or national of the United States.

2. You are a native of HAITI and a citizen of HAITI.

SEE CONTINUATION FORM I-831 ATTACHED

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

SEE CONTINUATION FORM I-831 ATTACHED

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to:

☐ 8 CFR 208.0(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: KROME NORTH SPC, 18201 SW 12TH ST., MIAMI, FL 33191

(Complete Address of Immigration Court, Including Room Number, if any)

on TO BE SET at _____ to show why you should not be
(Date) (Time)
removed from the United States based on the charge(s) set forth above.

/s/ FELICIA SKINNER, SOI
FELICIA SKINNER, SOI
(Signature and Title of Issuing Officer)

MIAMI, FL
(City and State)

Date: OCTOBER 26, 1997

See reverse for important information

U.S. Department of Justice
Immigration and Naturalization Service

Continuation Page for Form I-862

Alien's Name	File Number	Date
RICHARDSON, RALPH	A 17 566 876	OCTOBER 26, 1997

ALLEGATIONS CONTINUED:

3. You applied for admission to the United States on 10/26/97 at MIA-IAP as a returning permanent resident.

4. At the time of your application for admission the consular or immigration officer had reason to believe that you were or had been an illicit trafficker of a controlled substance, or were or had been a knowing assister, abettor conspirator, or colluder with other in the illicit trafficking of a controlled substance, to wit: you were convicted on 7/3/91 of conspiracy to traffick cocaine and sentenced to 5 yrs. with 3 yrs. served.

5. You admitted committing the following acts: possession of marijuana, loitering and prowling, eluding police, and probation violation for which you were returned to jail to serve the remainder of your 5 year sentence.

6. Those acts constitute the essential elements of crimes involving moral turpitude.

PROVISIONS CONTINUED:

Section 212(a)(2)(C) of the Immigration and Nationality Act, as amended, as an alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in a controlled substance, or knows or has reason to believe is or has

been a knowing assister, abettor, conspirator, or colluder in the illicit trafficking of a controlled substance.

Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as amended, as an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense).

Section 212(g) (2)(A)(i)(II) of the Immigration and Nationality Act, as amended, as an alien who has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of, a violation or a conspiracy or attempt to violate any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802.

Section 212(a)(2)(B) of the Immigration and Nationality Act, as amended, as an alien who has been convicted of two or more criminal offenses for which the aggregate sentences to confinement actually imposed were five years or more.

Signature	Title
ILLEGIBLE	IMMIGRATION INSPECTOR

[Seal Omitted]

United States Department of Justice
Immigration and Naturalization Service

Krome Service Processing Center
18201 SW 12 Street
Miami, Florida 33194

December 04, 1997

Kurzban Kurzban Weinger and Tetzeli, P.A.
Plaza 2650
2650 SW 27 th Avenue
Second Floor
Miami, Florida 33133

RE: Ralph RICHARDSON
A 17 566 876

Dear Mr. Kurzban, ESQ

This responds to your letter of November 13, 1997, requesting parole for the above named person, who is detained in Service custody. Please be advised that, after careful review and consideration, parole will not be extended to this individual at this time.

The detention of persons not clearly admissible to the United States is mandated by Section 235(b) of the Immigration and Nationality Act. The factors to be weighed by the District Director in evaluating requests for release from detention are set forth at Title 8, Code of Federal Regulations, part 212.5(a). After taking these factors into consideration in reviewing the parole request for the above applicant, I have concluded that a

favorable exercise of discretion is not warranted. Accordingly, the request for parole is hereby denied.

Sincerely,

/S/ CARYL THOMPSON
FOR THE DISTRICT DIRECTOR
Caryl Thompson
Acting Officer in Charge
Krome SPC

[Seal Omitted]

Memorandum

United States Department of Justice
Immigration and Naturalization Service
18201 S.W. 12 th. Miami, Fla. 33194

December 4th, 1997

Kurzban Kurzban Weinger and TetzelO, P.A.
Plaza 2650
2650 SW 27th Avenue, Second Floor
Miami, Florida 33133

RE: RALPH RICHARDSON, A17 566 876
SUPPLEMENT TO PAROLE REQUEST DENIAL LETTER

Dear Mr. Kurzban,

This letter is a supplement to the parole denial letter, which was mailed to your office on December 4th, 1997. The parole of aliens into the United States is justified only on a case by case basis for urgent humanitarian reasons or significant public benefit.

On October 26th, 1997, Mr. Richardson applied for admission as a returning permanent resident with an expired I-151 (Alien Resident Card) and a valid Haitian passport. This caused him to be referred to the Secondary Immigration Inspector for a more detailed interview on his application for admission. During this secondary interview, Mr. Richardson freely admitted to having been convicted of conspiring to traffick cocaine for which he was sentenced to five years imprisonment, of which he served three years. Subsequent to his admission of being convicted of a serious drug offense,

Mr. Richardson provided other information pertaining to his criminal history. In 1984 he was arrested and charged with possession of a firearm. He was again, in 1985, arrested and charged with possession of a controlled substance (marijuana). In 1992 and 1993 he was arrested and convicted of possession of a controlled substance (crack cocaine). Pursuant to Section 101 (a) (43) of the Immigration and Nationality Act, Mr. Richardson has been convicted of an aggravated felony.

The release of Mr. Richardson into the community will be of no significant public benefit. Mr. Richardson has not shown that his release would be warranted based upon urgent humanitarian reasons. Additionally, he is not eligible for any form of relief under the Immigration and Nationality Act. Consequently, he would have no incentive to appear for Immigration hearings.

Based on the above facts and circumstances of your client's case, a favorable exercise of discretion is not warranted at this time. Accordingly, the request for parole submitted on behalf of Mr. Richardson is denied.

Respectfully,

/s/ CHARLENE MONROE
CHARLENE MONROE
FOR THE DISTRICT DIRECTOR
Charlene Monroe
Acting Officer in Charge
Krome Service Processing Center

IMMIGRATION COURT
18201 S.W. 12TH ST
MIAMI, FL 33194

In the Matter of

Case A17-566-876

RICHARDSON, RALPH
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 1/8/1998

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or re-opened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Haiti

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( )denied ( )withdrawn.

[ ] Resepondent's application for withholding of removal was ( )granted ( )denied ( )withdrawn.

[X] Respondent's application for cancellation of removal under section 240A(a) was ( )granted (X)denied ( )withdrawn. Statutorily ineligible

[ ] Respondent's application for cancellation of removal was ( )granted under section 240A(b)(1) ( )granted under section 240A(b)(2) ( )denied ( )withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ____ of the INA was ( )granted ( )denied ( )withdrawn or ( )other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( )granted ( )denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: 212(a)(2)(C), 212(a)(A)(i)(II), 212(a)(2)(A)(i)(I).

Date:

Appeal: ~~WAIVED~~ Appeal By Respondent Due By: 2/9/98

\s\ KENNETH S. HUREWITZ
KENNETH S. HUREWITZ
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A17 566 876 – Krome Date: MAY 5 1999

In re: RALPH RICHARDSON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Helena Tetzeli, Esquire
Kurzban, Kurzban, and Weinger, P.A.
2650 SW 27th Street, 2nd Floor
Miami, Florida 33133

ON BEHALF OF SERVICE:

Elena R. Stinson
Assistant District Counsel

CHARGE:

Notice: Sec. § 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. 1182(a)(2)(A)(i)(I)]—Crime involving moral turpitude

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)]—Controlled substance violation

Sec. 212(a)(2)(B), I&N Act [8 U.S.C. § 1182(a)(2)(B)]—Multiple criminal convictions

Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)]—Controlled substance trafficker

APPLICATION: Termination; cancellation of removal

The respondent timely appeals the Immigration Judge's decision finding him inadmissible and ordering him removed from the United States. The respondent also appeals the Immigration Judge's decision pretermitting his application for relief from removal under section 240A of the Immigration and Nationality Act, 8 U.S.C. § 1229b. The appeal will be sustained in part and the record remanded. The respondent's request for oral argument is denied.

I. BACKGROUND

The respondent is a native and citizen of Haiti. The respondent was admitted for lawful permanent residence on January 21, 1968 (Tr. at 20). The record reflects that on July 3, 1991, the respondent was convicted in the Circuit Court, First Judicial Circuit of Escambia County, Florida for trafficking in cocaine in violation of section 893.135(1)(b)(3) of the Florida statutes (1990)[1]. The respondent was sentenced to 5 1/2 years imprisonment for this offense.

On October 26, 1997, after a visit to Haiti, the respondent was detained by the Immigration and

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[1] The Immigration and Naturalization Service alleges in the Notice to Appear (Form I-862) that the respondent was convicted of conspiracy to traffic in cocaine. The record of conviction indicates that the respondent was convicted under section 893.135(1)(b)(3) of the Florida Statutes (1991). The section for conspiracy is under section 893.135(5) of the Florida Statutes. The record of conviction contains no indication that the respondent's conviction was for conspiracy.

Naturalization Service while applying for admission. The respondent was issued a Notice to Appear (Form I-862) and placed in removal proceedings. The Service alleges that the respondent is inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), because there is reason to believe that he is a controlled substance trafficker. The respondent is also alleged to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, as an alien who has committed a crime involving moral turpitude, section 212(a)(2)(B) of the Act as an alien who has multiple convictions whose aggregate sentences to confinement are 5 years or more, and section 212(a)(2)(A)(i)(II) of the Act, as an alien who has been convicted of a controlled substance violation. The Immigration Judge found that the respondent was an alien seeking admission and sustained all the grounds of inadmissibility except for the multiple convictions ground under section 212(a)(2)(B) of the Act. Finding that the respondent's conviction was an aggravated felony, the Immigration Judge pretermitted the respondent's application for cancellation of removal. The respondent has appealed the Immigration Judge's decision to this Board.

II. THE RESPONDENT'S ARGUMENTS ON APPEAL

The respondent asserts on appeal that the Immigration Judge erred in finding that he was an alien seeking admission under section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-575 ("IIRIRA"). The respondent maintains

that under the doctrine established by the United States Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), he should not be regarded as making an "admission" into the United States. Alternatively, the respondent denied that he is inadmissible on the grounds alleged. The respondent maintains that the record of conviction submitted by the Service in support of the grounds of inadmissibility do not pertain to him. The respondent also argues that the record of conviction has not been properly authenticated pursuant to federal regulations, thus, is inadmissible as evidence of a conviction. Although the respondent concedes that he was convicted of possession of a controlled substance, he denies the allegation that he was convicted of trafficking in cocaine (Tr. at 24). Lastly, the respondent argues that he is statutorily eligible for cancellation of removal under section 240A(a) of the Act.

III. THE SERVICE'S ARGUMENTS ON APPEAL

In a short memorandum of law the Service adopts the Immigration Judge's decision. The Service maintains that the Board's decision in *Matter of Collado*, Interim Decision 3333 (BIA 1997), is controlling in this case. As such, the Service argues that the respondent is an arriving alien. The Service also argues that the record of conviction submitted by them in support of the allegations contained in the charging document meets the statutory and regulatory requirements for admissibility as proof of the respondent's criminal conviction.

IV. ANALYSIS

Despite his prior admission for permanent residence the respondent in this case has the burden of proving

that he is "clearly and beyond doubt entitled to be admitted into the United States and is not inadmissible under section 212." *See* section 240(c)(2)(A) of the Act, 8 U.S.C. § 1229a(c)(2)(A); 8 C.F.R. § 240.8(b); *see also, Matter of Rosas*, Interim Decision 3384 (BIA 1999). We find that the respondent in this case has failed to sustain that burden.

A. *Admissibility of the record of conviction*

The record of conviction submitted by the Service in this case indicates that a person named Ralph R. Richardson was convicted on July 3, 1991, of trafficking in cocaine. The respondent argues that this record of conviction does not relate to him (Respondent's Br. at 5). The respondent, whose name is Ralph Richardson, alleges that he has no middle name or initial. The respondent admits to a controlled substance conviction but maintains that it was for possession, not trafficking.

Where a deportation charge is based on documentary evidence bearing a name identical to that of a respondent, a reasonable inference may be made that such evidence relates to that respondent. *See Matter of Leyva*, 16 I&N Dec. 118, 121 (BIA 1977) (finding that a record of conviction that has a different first and middle name but the same last name is sufficient to establish that the record pertains to the respondent); *Matter of Lopez*, 15 I&N Dec. 183, 184 (BIA 1975) (where the names of the respondent and the person whose record of conviction is introduced into evidence are identical an inference may be drawn that the documents relate to the respondent, absent evidence to the contrary). The record of conviction in this case contains the respondent's first and last name. The respondent admitted to being arrested and charged in 1991. The respondent

admits that this arrest was for a controlled substance offense (Tr. at 22). The respondent also admitted pleading nolo contendere before Judge Bell in a criminal court in Escambia County, Florida (Tr. at 24-25). We note that all this information is reflected in the record of conviction submitted by the Service. Moreover, in a sworn statement made by the respondent to an immigration officer he admits to being convicted of a controlled substance offense (Exh. 3). Therefore, despite his assertions to the contrary the respondent has failed to provide any evidence that the record of conviction does not pertain to him. In light of all the evidence contained in the record we sustain the Immigration Judge's conclusion that the record of conviction for Ralph R. Richardson relates to the respondent.

The respondent also asserts that the record has not been properly certified as required under 8 C.F.R. §§ 287.6 and 3.41. As a result, the respondent argues that the record of conviction is not admissible to establish inadmissibility under the Act. The record of conviction contained in this case is a four page document. The last page contains a certification stamp, a raised seal of the court embossed over the certification, and a signature by the clerk for the Escambia Circuit and County Court (Exh. 2). Section 240(c)(3)(B)(vi) of the Act, 8 U.S.C. § 1229a(c)(3)(B)(iv), allows for any "document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction" to be used as proof of a criminal conviction in immigration proceedings. Although 8 C.F.R. § 287.6 requires that such records be certified, there is no requirement that the certification be placed on any particular page in the record. The record of conviction in this case is in

chronological order with each page numbered. There is no indication that anything has been altered or is missing from the record. As such, we find that the copy of the respondent's record of conviction has been properly attested to by an official having legal custody of that record and is admissible to support the grounds of removal alleged in this case. *See* 8 C.F.R. § 287.6; *Matter of Lopez*, *supra*, at 184.

B. *Applicability of section 101(a)(13) of the Act*

We reject the respondent's argument that under the doctrine established by the United States Supreme Court's decision in *Rosenberg v. Fleuti*, *supra*, he should not be regarded as making an "admission" into the United States. In our published decision, *Matter of Collado*, *supra*, we noted that the immigration laws concerning entry were changed with the enactment of section 301(a) of the IIRIRA. Previous to this enactment, the term "entry" was defined at section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (1994). However, by the time of the respondent's return to the United States on October 26, 1997, the term "entry" was no longer in effect. Instead, the term "entry" was repealed and in its place the terms "admission" and "admitted" were added.

Section 101(a)(13) of the Act, as amended by the IIRIRA, defines the terms "admission" and "admitted" with respect to an alien, as the lawful entry of an alien into the United States after inspection and authorization by an immigration officer. Section 101(a)(13)(C) of the Act regards aliens lawfully admitted for permanent residence in the United States as not "seeking an admission into the United States for purposes of the immigration laws" unless the alien has committed an

offense identified under section 212(a)(2) of the Act. An exception to this rule exists for aliens granted relief under section 212(h) or 240A(a) of the Act. *See Matter of Collado, supra.*

In *Collado* we held that the United States Supreme Court's decision in *Rosenberg v. Fleuti, supra* did not survive as a judicial doctrine after the enactment of the newly codified section 101(a)(13) of the Act. This Board further held that a lawful permanent resident of the United States described in sections 101(a)(13)(C)(i)-(iv) of the Act was to be regarded as an alien seeking admission into the United States, without further inquiry into the nature and circumstances of a departure from and return to this country. *See Matter of Collado, supra.*

While the respondent's appeal was pending, the United States District Court for the Southern District of Florida granted a petition for habeas corpus filed by the respondent addressing the unrelated issue of custody. *See Richardson v. Reno*, 994 F. Supp. 1466 (S.D. Fl. 1998). In its decision, the Federal District Court rejected this Board's reasoning in *Matter of Collado, supra*, and held that the United States Supreme Court's decision in *Rosenberg v. Fleuti supra*, was applicable to this case. *See Richardson v. Reno, supra* at 1472. The respondent on appeal reiterates this argument. In support of his contention the respondent has included a copy of the District Court's decision.

We are not persuaded by the respondent's submission of the District Court's decision rejecting our holding in *Matter of Collado.* The United States Court of Appeals for the Eleventh Circuit has recently reversed and vacated that decision. In a panel decision

the Eleventh Circuit held that the District Court lacked jurisdiction to hear the respondent's habeas corpus claim inasmuch as the IIRIRA repealed habeas jurisdiction over immigration proceedings. *See Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998). Therefore, our decision in *Matter of Collado* is still applicable in this jurisdiction and this Board is not collaterally estopped from applying its reasoning to the present case. *See Palciauskas v. INS*, 939 F.2d 963 (11th Cir. 1991) (applying the doctrine of collateral estoppel to immigration proceedings); *see also, Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993) (the Board of Immigration Appeals is not bound to follow the published decision of a United States District Court in cases arising within the same district).

The record reflects that the respondent has been convicted of a controlled substance offense involving cocaine. The respondent is, therefore, inadmissible under an offense defined in section 212(a)(2). In light of these facts we find that the respondent is to be regarded as seeking an admission to the United States for purposes of the immigration laws without further inquiry into the nature and circumstances of his departure and return to this country. *See* section 101(a)(13)(C)(v) of the Act; *Matter of Collado, supra.*

C. *Cancellation of Removal*

Lastly, we turn to the respondent's arguments regarding his statutory eligibility for cancellation of removal pursuant to section 240A(a) of the Act. Section 240A(a) of the Act provides that a lawful permanent resident may seek cancellation of removal if he (1) has been an alien lawfully admitted for permanent residence for not less than 5 years; (2) has resided in the

United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. *See Matter of C-V-T-*, Interim Decision 3342 (BIA 1998).

The Immigration Judge determined that the respondent's controlled substance conviction was an aggravated felony and pretermitted his application for cancellation of removal (I.J. at 7-8). The respondent, however, argues that since his criminal conviction pre-dated the effective date of the IIRIRA, it cannot be used to bar his eligibility under the Act.

We find that the record contains insufficient evidence to support a finding that the respondent had been convicted of an aggravated felony. We, therefore, need not reach the merits of the respondent's argument on the temporal scope of the aggravated felony bar to relief from removal under Section 240A(a) of the Act.

Section 101(a)(43)(B) of the Act includes in the definition of aggravated felony the "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." In determining whether a state drug offense qualifies as an aggravated felony under section 101(a)(43)(B) of the Act, this Board has essentially established a two-pronged test. *See Matter of L-G-*, Interim Decision 3254 (BIA 1995). Under the first prong, a state drug offense is an aggravated felony if it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined. *Matter of L-G- supra.* The second prong of the test, requires that a state drug offense qualify as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2),

punishable as a felony under the Controlled Substance Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). *See Matter of L-G-, supra; Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990).

In this case, the respondent was convicted under section 893.135(1)(b)(3) of the Florida Statutes. Section 893.135(1)(b)(3) requires that a criminal defendant knowingly sell, purchase, manufacture, deliver, or bring into the state, or knowingly be "in actual or constructive possession of, 28 grams or more of cocaine as described in section 893.03(2)(a)(4)" or of any other mixture containing cocaine. We note that the statute under which the respondent was convicted is divisible; meaning it encompasses offenses that include drug trafficking as defined under section 101(a)(43)(B) of the Act, as well as offenses that do not. *See Matter of Teixeira*, Interim Decision 3273 (BIA 1996) (divisibility analysis applied to firearms); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989) (divisibility analysis applied to crimes involving moral turpitude); *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979) (divisibility analysis applied to controlled substance offenses). For example, a criminal defendant may be convicted under section 893.135(1)(b)(3) for selling, purchasing, manufacturing, or delivering cocaine. All of these offenses would constitute an aggravated felony under the Act under either prong of *Matter of L-G-, supra*. However, the statute also criminalizes being in actual or constructive possession of 28 grams or more of cocaine. To prove a defendant was in "constructive possession" of cocaine, all that is needed under Florida law is proof that the defendant had dominion and con-

trol over the cocaine, knew it was within his presence, and had knowledge of its illicit nature. *See Green v. State*, 667 So.2d 208 (Fla. Dist. App. 1995). Possession of a controlled substance lacks a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined. *Matter of L-G- supra.* Thus, the first prong of *Matter of L-G-* is not satisfied. Unless a respondent has had prior drug convictions, possession of more than 5 grams of a mixture or substance which contains "cocaine base" is the sole possession offense under 21 U.S.C. § 844(a) which is punishable as a felony. *Id.*

Where a statute under which an alien was convicted is divisible, we look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense for which the alien was convicted will sustain a ground of inadmissibility. This approach does not involve an inquiry into facts previously presented and tried. Instead the focus is on the elements required to sustain the conviction. *See Matter of Pichardo*, Interim Decision 3275 (BIA 1996).

Looking to the record of conviction in this case we note that there is no indication of what specific crime under section 893.135(1)(b)(3) the respondent was convicted of committing. There is nothing in the record indicating that the respondent's single drug conviction under Florida law involved cocaine base. There is, likewise, no evidence that the respondent's conviction was for selling, purchasing, manufacturing, or delivering cocaine[2]. Therefore, on this record we cannot find

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[2] We note that the record of conviction does state that the respondent was convicted of "trafficking" in cocaine. However, sec-

that his offense is analogous to a felony under the Controlled Substance Act. *See Matter of Batista-Hernandez*, Interim Decision 3321 (BIA 1997). In light of these facts we find that the respondent's conviction cannot be construed as an aggravated felony as defined under section 101(a)(43)(B) of the Act. We note that the respondent consistently maintained that he was convicted of possession. The record of conviction provides no information that refutes his contention.

We recognize that the United States Court of Appeals for the Eleventh Circuit has recently held that a felony conviction for possession of a controlled substance is an aggravated felony. *See United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999) (rejecting argument that a state drug offense must be classified as a felony by the Controlled Substance Act). However, we note that *Simon* involved the term aggravated felony as used in U.S.S.G. §2L1.2(b)(1)(A) (1997) and not the Immigration and Nationality Act. Moreover, we note that the Eleventh Circuit adopted the approach taken by the First Circuit in *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996) (term aggravated felony includes a state felony drug possession offense that would only be a misdemeanor under federal law), which rejected the reasoning of *Matter of L-G-*, *supra*, because the Board's reasoning was inconsistent with the Second Circuit's holding in *Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994) (alien's state conviction for a drug offense that is a felony under state law, but a misdemeanor under federal law, qualifies as a conviction for an aggravated felony). The Second Circuit, however,

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tion 893.135(1)(b) labels the actual or constructive possession of cocaine as a "trafficking" offense.

has since vacated its holding in *Jenkins*. *See Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). Since the Eleventh Circuit has not issued a decision rejecting our interpretation of section 101(a)(43)(B) of the Act, as articulated in *Matter of L-G-*, *supra*, and cases cited therein, we decline to follow precedent that interprets the Sentencing Guidelines and not the Immigration and Nationality Act.

The respondent was admitted as a lawful permanent resident to the United States in 1968. There is no indication in this record that the respondent has failed to reside continuously in the United States since that time. Consequently, upon the evidence contained in this record we find that the respondent is currently statutorily eligible for cancellation of removal under section 240A(a) of the Act.

V. CONCLUSION

We sustain the Immigration Judge's determination that the respondent is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, as a controlled substance offender. However, in light of our determination that the respondent's criminal conviction may or may not be a controlled substance trafficking offense, we decline to sustain the Immigration Judge's decision finding the respondent inadmissible under sections 212(a)(2)(C) and 212(a)(2)(A)(i)(I) of the Act. Since the statute under which the respondent was convicted is divisible, we likewise cannot find that the respondent's criminal offense constitutes a drug trafficking crime under section 101(a)(43)(B) of the Act. We note that on remand the Service is not precluded from introducing evidence establishing that the respondent has indeed been convicted of illicit trafficking in a controlled substance

and is, thus, deportable as an alien convicted of an aggravated felony after admission. However, as the record currently stands, the respondent is statutorily eligible to apply for cancellation of removal pursuant to section 240A(a) of the Act. Accordingly, the following order shall be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for entry of a new decision.

ILLEGIBLE SIGNATURE
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Miami Florida

A 17-566-876

IN THE MATTER OF: RICHARDSON, RALPH,
RESPONDENT

IN REMOVAL PROCEEDINGS

[Jun. 8, 1999]

ORDER

The Court finds pursuant to the Board of Immigration Appeals decision, dated May 5, 1999, that the respondent is statutorily eligible to apply for Cancellation of Removal pursuant to section 240A(a) of the Act.

This relief is discretionary and a hearing will be held on July 19, 1999, at 9:00 a.m.

Dated: June 8, 1999

\s\ KENNETH S. HUREWITZ
KENNETH S. HUREWITZ
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
KROME SERVICE PROCESSING CENTER
MIAMI, FLORIDA

A17-566-876

IN THE MATTER OF: RICHARDSON, RALPH,
RESPONDENT

IN REMOVAL PROCEEDINGS

ON BEHALF OF THE RESPONDENT:

Helena Tetzeli Esquire
2650 S.W. 27th Ave 2nd Floor
Miami, Florida 33133

ON BEHALF OF THE SERVICE

Loren Coy Esquire
Assistant District Counsel
Miami, Florida

Charges:

Section 212(a)(2)(C) of the Immigration and Nationality Act, as amended, as an alien who the consular officer or Immigration officer knows or has reason to believe is or has been an illicit trafficker in a controlled substance or knows or has reason to believe is or has been an assister, aider, abettor, colluder, conspirator, in the illicit trafficking of a controlled substance.

Section 212(a)(2)(A)(i)(I) of the Act, as an alien who has been convicted of or admits having committed or admits committing acts which constitute essential elements of a crime involving moral turpitude other than a purely political offense.

Section 212(a)(2)(A)(i)(II) of the Act, as an alien who has been convicted of or admits having committed or admits committing acts which constitute the essential elements of a violation or a conspiracy to violate any law or regulation of a state, the United States or a foreign country relating to a controlled substance.

Section 212(a)(2)(B) of the Act, as an alien convicted of two or more criminal offenses for which the aggregate sentence to confinement actually imposed was five years or more.

Section 212(a)(6)(C)(i) of the Act, in that you are an alien who, by fraud or willfully misrepresenting a material fact seeks to procure or has sought to procure or has procured a visa or other documentation or admission into the United States or other benefit under the Act.

APPLICATIONS:

Termination

Cancellation of Removal pursuant to section 240A(a) of the Act.

DECISION OF THE IMMIGRATION JUDGE

The respondent, a native and citizen of Haiti, who was first admitted to the United States as a permanent

resident on January 21, 1968 at age two. On October 26, 1997, the respondent was returning to the United States as a returning resident. At that time, the Service stopped him and held him in custody issuing an NTA on October 26, 1997, charging him with inadmissibility as charged above, other than section 212(a)(6)(C)(i), which was added subsequently. At a hearing before the undesigned, the respondent, through counsel, conceded that he was a native and citizen of Haiti, not a citizen of the United States, that he was a permanent resident, that he was returning to the United States on that date. Counsel denied the conviction, and also denied that he should be considered an arriving alien.

On January 8, 1998, this Court found the respondent to be inadmissible and statutorily ineligible for cancellation of removal, and ordered him removed from the United States. The Board of Immigration Appeals, in a decision dated May 5, 1999, found the respondent to be an arriving alien, subject to removal only under section 212(a)(2)(A)(i)(II), for having been convicted of a drug offense. The Board also found the respondent not to be an aggravated felon, and, therefore, eligible for cancellation of removal, and remanded the case back to this Court. Since the Board ruled on the issue of entry, the Court will not address that issue in this decision. It was addressed in the Court's previous decision.

At the resumed hearing, counsel for the respondent made a motion that this Judge recuse himself because the Court's law clerk had been offered employment with the Service, at the completion of his clerkship. In the instant case the Court had not even reached a decision when the law clerk left, and he was not involved in

the final decision. A Judge should only recuse himself where there is a clear showing of personal bias or prejudice. *Matter of K-*, 5 I&N Dec. 347 (BIA 1953). There has been no such showing. There has been no showing that the law clerk was prejudice [*sic*] in favor of the Service based on his future employment. The motion to recuse must, therefore, be denied.

The Service on remand submitted additional evidence including a conviction for loitering and prowling, and carrying a concealed weapon, Remand ex. #18, to support a charge under section 212(a)(2)(B). Since the respondent was sentenced to more than five years in prison pursuant to his conviction for trafficking in cocaine, Remand ex. #6, he is inadmissible under section 212(a)(2)(B) of the Act. The Service withdrew the charge under section 212(a)(6)(C)(i) of the Act. The Service elected not to challenge the Board's ruling regarding respondent's inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act.

The Service introduced additional evidence pursuant to the Board's ruling, to support their position that the respondent was subject to removal under section 212(a)(2)(C), and was an aggravated felon, and, therefore, ineligible for cancellation of removal. The Board in their decision said, "We note that on remand the Service is not precluded from introducing evidence establishing that the respondent has indeed been convicted of illicit trafficking in a controlled substance and is, thus, deportable as an alien convicted of an aggravated felony after admission." This despite the fact that the respondent is an arriving alien, and is not subject to section 237 of the Act.

The Service first introduced conviction records, indicating a conviction for carrying a concealed firearm, and unlawful possession of cannabis, August 6, 1985, Remand ex. #19, and for unlawful sale of cannabis, August 13, 1986, Remand ex. #16. Respondent's counsel was given an opportunity to review these records and at a resumed hearing. On September 3, 1999, counsel submitted remand exhibits 16A, and 19A, judgements by the Circuit Court dated September 1, 1999, vacating these convictions.

The Service then introduced, the police report for the respondent's conviction for trafficking in cocaine, Remand ex. 20, indicating that the 581 grams of cocaine, for which he was convicted of was crack cocaine, a mixture containing cocaine base.

The Service called Larry Aiken, Deputy Sheriff, Escambia County, Florida as a witness. Mr. Aiken testified that he worked in the Narcotics Division July 1985 to October 1991, and then returned to the unit as Assistant Officer in Charge Narcotics Unit, December 1994. He was qualified as an expert in cocaine having attended DEA Drug Unit Commanders school. He worked with customs, DEA, and OCIDEF. Mr. Aiken identified the respondent, and, testified that he received information that cocaine was being brought into Pensecola Airport. He found 581 grams of crack cocaine with Mitchell Thevenin Remand ex. #5. Mr. Thevenin stated the Mr. Richardson had supplied the drugs. He obtained a warrant for Mr. Richardson's arrest, who lived in South Florida, Pembroke Pines. He was arrested on the warrant and transported to Pensecola.

At first Mr. Richardson was not cooperative, but the later cooperated, identifying Charles White as the person who was to receive the cocaine. He admitted that the cocaine seized from Thevenin had been supplied by him (Mr. Richardson). Mr. White was a major local supplier, and received a 15 year sentence for trafficking in cocaine. Mr. Richardson admitted to Mr. Aiken, that he had an ongoing relationship with Mr. White.

Mr. Aiken testified that he personally tested the drugs and it was crack cocaine. He also testified that this was a small town (1000 people), with a major drug problem.

Additionally, the Service introduced a deposition taken from Mr. Richardson, in Mr. White's case Remand ex. #9. In this deposition the [*sic*] Mr. Richardson said that he was born in Brooklyn, New York, Page 4 line 13, and that he used the name Richard, page 4 line 3. He went on to say that he had a previous arrest in Miami in 1986 for possession of marijuana for which he received probation, and a CCW in 1985 or 1986. (page 5). He then stated that he arranged for Mr. Thevenin to transport drugs to Pensecola for Mr. White. (Page 7). Mr. Richardson said that he obtained the drugs from different people, Stick a black male, and from some Cubans including Jose. He had no one in particular (page 8 lines 22, 23). He said that he received 17 or 18 oz. Of crack cocaine (page 9 lines 16-20). Mr. Thevenin made trips for him and received varying amounts of money depending on the quantity (pages 10 and 11). He then was questioned regarding who would have testified against him including Mr. Thevenin, and how he got arrested.

He then stated that he had not made a deal for his testimony, but hoped to get a break (page 20). He stated that he met Mr. White three years earlier through a woman named Paula Warrer, a girlfriend of Mr. White. He said that he was already involved in selling drugs, (page 22 lines 17-25). He starting bringing drugs to Pensecola in 1986 (page 23 line 5). He was a small dealer, 2 or 3 oz. at that time, and Paula told him that Mr. White could make him a lot of money (page 24). In 1989 he had about 5 or 6 oz. of crack cocaine worth about $6500 (page 26). He testified regarding other individuals. He testified that he derived his income from drugs from June 1989 to September 1990, based on up to 10 trips for Mr. White (page 38). He later said that there were other trips and that he earned $10,000 per trip and had no other income. On cross examination by the Service, he admitted the facts stated in his deposition and admitted to being a drug dealer.

AGGRAVATED FELONY ANALYSIS

In the Board's decision, page 7, they said, an alien convicted for possession is not an aggravated felon, "unless a respondent has a prior drug conviction, or possess more than 5 grams of a mixture containing crack cocaine."

Since respondent's counsel was able to vacate respondent's two prior drug convictions, he does not fall within the first provision as set out by the Board. The Service continues to argue that respondent's conviction is an aggravated felony because it involved more that 5 grams of crack cocaine, as evidenced by the police report and the testimony of Mr. Aiken. Respondent's counsel cites *Matter of Texeira*, I.D. 3273 (BIA 1996), and *Matter of Short*, 20 I&N Dec. 136 (BIA 1989), for

the proposition that a police report is not part of the record of conviction. The Court must agree that pursuant to *Matter of Texeira*, "the police report is not part of a record of conviction." The respondent's deposition in Mr White's case is also clearly not part of his record of conviction.

Since the Board's precedent does not allow this Court to use the above evidence to demonstrate that the respondent was convicted for trafficking in crack cocaine, the Court can not find that the respondent was convicted for an aggravated felony, based on possessing more than 5 grams of cocaine base.

The Court, however, does concur with the Service's position, as laid out in their brief accompanying their interlocutory appeal, that a trafficking in cocaine conviction based on possession in excess of a certain amount, clearly indicates that such possession was not for personal use. Federal Courts have held that intent to distribute drugs may be inferred solely from possession of a large quantity of a controlled substance. *U.S. v. Koua Thao*, 712 F.2d 369 (8th Cir. 1983), *U.S. v. DeLeon*, 641 F.2d 330 (5th Cir. 1981), *U.S. v. Edwards*, 602 F.2d 458 (1st Cir. 1979), *U.S. v. Love*, 599 F.2nd 107 (5th Cir) cert denied 444 U.S. 944 (1979).

Additionally, the Court believes that it is bound by the 11th Circuit's ruling in *United States v. Simon*, 168 F.3rd 1271 (1999). In this decision the Court found that a felony conviction under Florida law for possession of cocaine was an aggravated felony, as defined under 18 U.S.C. 924(c)(2). The Court specifically said, "the commentary to section 2L1.2(b)(1)(A) defines aggravated felony as it is defined in 8 U.S.C. 1101(a)(43)(B)." This section, 101(a)(43)(B) of the Act, includes any drug

trafficking crime as defined in section 924(c) of Title 18. While the Board and the Judge are not bound by circuit court decisions outside their jurisdiction, they are bound by the Circuit's decision which covers the jurisdiction of the hearing. The respondent has been convicted of an aggravated felony.

INADMISSABILITY UNDER SECTION 212(a)(2)(C) OF THE ACT

Section 212(a)(2)(C), states that one is subject to removal if an immigration officer knows or has reason to believe that an alien has been an illicit trafficker in any controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder, with others in the illicit trafficking in any controlled substance.

A conviction is not required for such a finding, *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977). In *Rico*, the applicant was not convicted for a drug offense, but the Board found reason to believe based on testimony and evidence. In the instant case the evidence, clearly establishes that the respondent was earning his living in the late 80's by selling crack cocaine in Florida. The respondent's own deposition, Remand ex. #9, establishes this fact. The testimony of Mr. Aiken, also, clearly satisfies the provisions of section 212(a)(2)(C) of the Act. In *Rico*, the Board said, "Unlike the criminal judicial proceeding where a defendant must be found guilty beyond a reasonable doubt, an administrative finding of excludability must be based upon reasonable, substantial, and probative evidence." The evidence, including his conviction for at least possessing 581 grams of cocaine, including crack, and his admissions relating to the selling of crack cocaine, demonstrates not only a reasonable belief that the respondent traf-

ficked in cocaine, but such belief is beyond a reasonable doubt.

The respondent is inadmissible pursuant to section 212(a)(2)(C) of the Act.

CANCELLATION OF REMOVAL

While the Court has found the respondent to have been convicted of an aggravated felony, and thus ineligible for cancellation of removal, a full hearing was held based on the Board's remand. The Court notes that the Board in its remand was aware of the 11th Circuits ruling in *Simon*, but did not follow it. After careful reading of that case, this Court feels that *Simon* is controlling. In order to avoid any future hearings, the Court will now address the issue of cancellation of removal assuming he is statutorily eligible for the relief.

Janice Richardson respondent's wife testified that she was born in Pensecola and met Mr. Richardson in 1988, marrying him January 15, 1991. They have one child together, Miriah, and he has one child, JoAnna, and she has one child, Chris. They all lived together. She did not know of his prior criminal record.

They moved to Atlanta in 1992 to change their life. He was arrested the second time for violation of probation in 1992, when they were visiting her mother in Pensecola for Thanksgiving. He was then sentenced to a term in prison. This changed her life, especially financially. She had to work two jobs, and the children were upset. Friends helped take care of the children. After his release things got better, and they lived a

normal family life. They played basketball and Thursday was family day, where they all did things together.

Ralph had a good relationship with Chris (stepson). Since the respondent's detention by the Service, Chris has suffered. His grades have slipped, and he does not want to participate in sports, where his father had been the coach. He hides under the desk, cries a lot, and secludes himself. Chris has visited his father about 3 times. He has gone to counseling, and the teachers know of his problems.

Chris wants to see his father, but he gets depressed afterwards, and it takes him time to get back into his routine. Her husband calls everyday to make sure the children go to school. She leaves at 5 AM to go to work. She can not afford things such as gymnastics and other activities. She did not have these problems when Ralph was home.

She now cleans buildings that Ralph used to do, as well as doing her other job. She does this twice a week. She also works for Family and Children Services as an administrator. They had a snow cone business but lost it when he was detained. She is in a bad financial situation, and is even behind on her mortgage payments.

Chris's father is not involved in his life. The only father Chris knows is her husband. Ralph has a good relationship with JoAnna. She now lives with her mother in Miami, because she can not take care of all the children. JoAnna wants to come home to Atlanta. She is very quiet and is upset about her father. Ralph always supported his daughter prior to being arrested. JoAnna went to school in Atlanta.

Miriah is young, cries ,and wants her father, but does not understand. She was upset when a bond was set by the Service, and then revoked. The whole family was upset as they were planning a get together when he was released.

In Atlanta they did everything together, including going to church. Ralph took care of the kids, as well as cleaning the house. He came home earlier than her, and helped out at home. It is terrible not having Ralph home. She is totally stressed and has no life. She had to give up basketball, including the possibility of playing in the WNBA with the Liberty. If Ralph were there she could have pursued this as he always supported her. She now has callouses on her hands because of hard work.

She would not go to Haiti with Ralph. Conditions are very bad in Haiti. She does not speak Creole, but while he does speak it, he does not speak it very well.

Ralph would help anyone in the community. He left in the middle of the night to help a stranded friend, and everyone loved him.

Ralph expressed remorse and cries saying he is sorry. He would not get involved in criminal activity again. He often complains about things at Krome, including his health.

If Ralph were deported she would not go on as today. She would move to Pensecola with her mother and would have to start over again. She considered suicide because of the stress, and also thought that maybe this would allow her husband to be released. While she considered divorce, she has not filed papers because she

wants to continue to live with him in the United States. She is aware of two arrests, although she does not know what happened in 1990, prior to their marriage. When they were dating she saw him about every three months, when he would come for a week.

She testified regarding his second arrest for violation of probation in 1992. She testified that they were leaving for Atlanta after Thanksgiving, from her sister's house in Pensecola. He took a friend Tony to his hotel, and then did not come back as he said he would. She drove by the hotel, but Tony was not there, although he did not check out. She then found out that Ralph has been arrested for fleeing the police. Her husband told her he knew nothing of the drugs in the car, although he fled. He fled when Tony said, "don't stop I have something in the car."

Ralph has no business office, and uses an answering service. He runs the business from his home. He has never had an office in Atlanta. She was shown a copy of a 1996 tax return that he submitted, Remand ex. #7. He filed as a head of household, address 2263 Comet Way, Atlanta, Georgia 30318. They never filed a joint return. She does not know where the above address is. She filed tax returns on her own using her home address. She files single claiming 2 children, Chris, and Miriah. She has not submitted any tax returns.

She married the respondent while in jail, and Miriah was born while he was in jail. Miriah was over one year old when he was released, in March 1992. He was working continuously prior to his detention by the Service.

The respondent called a friend, Rick Clark, as a witness. Mr. Clark has a designer jewelry business in Atlanta, Georgia, who hired Mr. Richardson to clean his business. Mr. Richardson originally worked for the prior contractor. When the contract expired, Mr. Richardson bid on the job and was hired. He knows Mr. Richardson since 1995. He believes that Mr. Richardson is a hard working, trustworthy, and highly motivated person. He knows of the respondent's other businesses including, his auto detailing business, snow cone business, and this executive cleaning business.

Although he did not know of the respondent's arrests, and may not have hired him, he does not regret his decision. Respondent's wife took over the cleaning of his offices, when the respondent was arrested. His detention by the Service created tremendous hardship for the family. He offered Janice, respondent's wife money, and she did accept a loan. The money was paid back. Janice and he have talked and she has unloaded her feeling with him.

On cross examination he testified that he learned of the respondent's arrest record only after he was detained by the Service. He had the contract for about 2 or 3 years. He pays $6000 per month and has 5000 square feet. He knows that respondent has other accounts including one of about 50,000 square feet. He learned of the respondent's criminal record for drugs, and firearms from Janice after his arrest by the Service. He was asked why, a recommendation he submitted, Remand ex. 12, only mentioned firearms. He stated that Janice did not originally tell him about the drug arrest. Respondent's criminal record came out piecemeal, when the respondent was not released by

the Service. He has never visited the respondent's house, and only knows that he lives in the Northern part of the city.

Respondent next called Mario Laurencau, his cousin who is Director Phoenix Clinic (nurse). He was Deputy General counsel for Haiti in Miami from May 1991 to August 1995. He does not know if respondent speaks Creole. He testified that the respondent has no family in Haiti. He stated that up to 1995 deportees to Haiti were detained on return, but were released. He lived with the respondent, while he was in school. He last saw the respondent about 4 years ago. He does not know the names of respondent's children, and does not know about his criminal record. He testified that he talks to Mr. Richardson about once a month at Krome.

The respondent then called Gerald Aquino, a United States citizen, who is married to Mr. Richardson's cousin. He helped the respondent move to Miami in 1982, and helped take care of his children. Mr. Aquino is an IRS Tax Revenue agent, and lives in Miramar, Florida. He knows the respondent very well. However, he only saw him a few times after respondent moved to Atlanta. He talked to him at Mr. Richardson's father's funeral. He testified that Mr. Richardson's children love him, but he has not talked to Mrs. Richardson or the children since respondent's detention. He knows that the respondent was arrested, and he believes it was for drugs. He thinks Mr. Richardson spent three years in jail. Respondent's parents had 9 children, and had financial problems. The respondent's aunt and uncle helped out. Respondent's mother had emotional problems, and could not take care of the children, so their aunt and uncle did. He last saw

respondent at his father's funeral. He never visited him in Georgia, or while detained. He was aware that the arrest was for crack cocaine, and knows that Mr. Richardson made a bad mistake. He testified that Mr. Richardson violated probation by being with someone he was not suppose to be with, and that he, therefore, fled the police.

He does not know what Mr. Richardson did for a living from 1988 to 1990. He believes, however, that Mr. Richardson is a good person, who made a mistake. He testified that he thinks respondent's brother Angel is addicted to drugs. He talked to respondent at Krome, and thinks he has changed.

He testified that Mr. Richardson had a car wash business in Atlanta. He saw a change in Mr. Richardson after his uncle's death in 1987. It was he uncle, Mr. Joseph, who helped support the family.

Karlie Richardson, respondent's sister then testified. She is 40 years old, lives in Boyton Beach, Florida, and is a property manager for HUD. She came with respondent to the United States, when she was 8 and he was 2. They were raised in Brooklyn, New York. She says that respondent did not know that he was born in Haiti. He graduated High School in Miami, having moved from New York at age 14. He came to live in Miami with his aunt and uncle because it was a good place to live. Their mother suffers from depression and slight retardation. Their parents moved to Florida in 1981 or 1982, but Ralph remained with his aunt of uncle. Their father had a stroke in 1982, and was in a nursing home for a long time before passing away about 1997. Mr. Richardson came to visit his father about once every 6 weeks while in Atlanta.

They are a close family, and although he is a younger brother, he is always there for her. He broke down and apologized to the family for what he had done. She knows he went to visit someone in Pensecola, when he violated probation, but he was there visiting his wife's parents. She speaks to him 3 times a week, and he is really depressed about his children, especially Chris. Mr. Richardson attends church.

James (Jimmy), respondent's younger brother goes to school in Georgia, and Ralph was like a father to him. When James was arrested for graffiti, Ralph disciplined him. She would be devastated if he were deported, because he is always there for her. He has no one in Haiti, and his Creole is very poor.

She speaks to his children and they are suffering. Chris is very withdrawn. JoAnna's grades went down. JoAnna now lives with her biological mother. Miriah always cries, and wants her daddy. His wife, Janice is stressed out and has to work 3 jobs. Chris who is 10 years old sometimes has to take care of Miriah. Their mother would go into depression if he were deported. He would be homeless in Haiti.

On cross examination she testified that her younger brother enrolled in college in Georgia, so that the respondent could help him. However, due to his detention by the Service, he has not been able to assist his brother.

She was naturalized because it was important to her, but no one told Ralph that he was not born in the United States. She worked for the Immigration Court as an interpreter, so she had to be a United States citizen. She does not approve of respondent's actions,

and she has not told her 12 year old son, about the respondent's criminal record.

She testified about her brother's activities in the 1990s, but did not know about the earlier arrests in 1984 and 1986. Ralph's criminal attorney explained everything about the case to her. She believes everyone makes mistakes and should be given another chance. He told her he would not do it again.

She knew about his violation of probation, but believes he was simply with someone who had drugs, and that he did not know about the drugs, and was not involved. He has changed and tells his children not to use drugs. He went to Haiti in 1997 for a mass in his father's memory. Ralph helped his family during his father's illness.

Chris, respondent's stepson then testified. He identified the respondent, and call him dad, and stated that he loves him and misses him. His father coached his basketball team and everyone on the team misses him. It is not fun to be in little league sports without his father.

His sister Guithele Ruiz testified. She is a Human Resource Director in Pembroke Pines. She has a good relationship with the respondent. Ralph has a good relationship with her children. He is a male role model for her son. He is a good father and husband. His parents were not told about the incident (arrest), because of their illness. Ralph came and apologized to his parents.

She takes respondent's daughter, Miriah to Krome to visit her father. When Miriah and Chris come to

Florida, Chris stays with her brother, Harvey, but she does not know if Chris comes to visit his father. Chris sometimes has to stay at home in Atlanta with his sister, when Jan is working. This is difficult. Mr. Richardson calls home in the morning to make sure that Chris and Miriah go to school, since Jan often leaves before the children.

Ralph has been a strong male figure and it would be devastating to his wife, children and mother if he were deported. Miriah is withdrawn without her father. JoAnna is talking with older men, something she would not do if Ralph were there. Chris (Jan's son) was out of control before Ralph entered the scene. He listens to Ralph, who is the only father he knows. She has never seen Chris's real father. Ralph would have nobody in Haiti, and would not be able to take care of himself.

She has worked for the Florida Voluntary Action Caribbean Initiatives Program, as a voluntary. She has been in Haiti 4 times in the last 2 years with this group. She testified that Haiti is not a safe place, and that her brother might not by safe there. Conditions are bad and there is no safety. On cross examination she sated that she was safe because it was a short visit and she was with a group at a hotel.

She is very proud of the respondent, since he was able to start 2 businesses to support himself. He lives in Atlanta and his house is worth between 80 and 85 thousand dollars.

Her mother has mental problems and is in total denial about Ralph. She thinks he is in the army. They do not tell her the truth, and she is on medication.

Ralph used to help his mother by buying things including food.

Her son, Andy, 21, wants to marry, and thinks so much of Ralph's opinion that he even brought his girlfriend to see Ralph while Ralph was detained. Andy thinks of Ralph as a good friend who he would miss greatly.

Ralph could not survive in Haiti, as his Creole is poor, and has no one to help him. He would have to live on the street.

Ralph always thinks of his family, children, and wife, not himself. He is worried that he will get sick like his mother because of his detention. His mother blames herself for Ralph's detention as he accompanied her to Haiti. She testified to this after saying that her mother thought he was in the army.

On cross examination she said, everyone makes mistakes, and they may still be a good person. When he was arrested, Jan was pregnant. He was a wonderful dad and husband. She learned of his criminal problems after the fact, and spoke to his attorney in Pensacola, and Ralph plead guilty to the charges.

On a second trip to Pensacola, Ralph's dad saw him, while he was awaiting trial. She did not know exactly what Ralph was convicted of, and was not aware that crack cocaine was involved. She did not know what the length of his probation was, and was not aware that he fled the police while on probation. Ralph never really explained to her what happened.

She said everyone makes mistakes, and they can still be a good person. This was repeated many times. She only talks positive things with Ralph. She did not know that he had a gun in the car when he was first arrested in Pembroke Pines, while taking kids to a game. She said that it was okay, however, because Ralph lived in a dangerous neighborhood where guns were necessary, Her father had a stroke, and, therefore, they did not tell him about Ralph.

Jan (his wife) was pregnant while he was in jail in 1991. Joanna now lives with her real mother, while Chris and Miriah live with Jan. Jan is under a great deal of stress due to Ralph's incarceration by the Service. She knows nothing about Mr. White, and did not know he was selling drugs to make money. She is afraid for Ralph, if he is forced to return to Haiti.

The respondent then testified regarding his request for Cancellation of Removal. On direct examination he testified calmly, quietly, and presented a very sympathetic case. He was a different person on cross becoming very abrasive, and evasive. On direct examination he testified that he came to the United States from Haiti, in 1968, at age 2. He has no memories of Haiti, but his first recollections are of Brooklyn where he was raised. He has 8 brothers and sisters. His father was a professor, and his mother a teacher. He grew up in Brooklyn in a close family. His parents did run into problems, marital, and his father left when he was about 6 years old. His mother had medical problems, so he moved in with aunt and uncle. They took him in to keep him out of trouble. He lived with his aunt and uncle in Florida, from age 13 to 16, (1984), when his aunt died. He went to school in Florida, and graduated

from North Miami Senior High, after dropping out of North Miami Beach High School His problems started after his aunt died. He speaks little Creole, and always thought he was a United States citizen. Most of his friends were American and not Haitians.

He testified that he registered with selective service, assuming he had been born in Brooklyn. He starting cutting school at age 17, using drugs and hanging around with the wrong people. He met a girl named Sharon, and had a child JoAnna. He started working at Wendy's to support his child. He never married Sharon. He then finished High School, and took courses at Miami Dade Community College. He started to have money problems, despite having two jobs, at Wendy's and with Miami Dade College, and he then began to sell drugs.

He lived in a tough neighborhood, Washington Park, where selling drugs was easy. After his break up with Sharon, JoAnna came to live with him. She lived with him after his release from jail, but she now lives with her mother because he is detained. He has a daughter with his wife, Miriam, and a stepson Chris. In 1992, he was released from jail and moved to Georgia to begin a new life. He did not want to go back to South Florida, and his brother Mark lived in Atlanta. He took various jobs, including selling flowers, and taking pictures. He made contacts and then opened a car wash. Business was slow in the winter, so he started a car detailing business, and a cleaning service. He started Exclusive Touch, which his wife still runs. However, many of the accounts have been lost, because of his detention. In 1997, he had 4 contracts and 10 employees. Today he only has one contract with Mr. Townsend who pre-

viously testified. He also had three employees at the detailing business, which he does not have today.

Life was good in Atlanta, and he got involved in the community, coaching and then becoming commissioner in the the North Cross Community. Chris quit baseball because his father was not there to coach, however, he is now trying out for football. Before his detention he worked Monday to Saturday, from 8 to 3:30. He was, therefore, able to spend time with his children. He would help them with their homework, help with the cooking and take them to the park. On Sunday they would go to church, eat and spend time together. He earned about $30,000, and his wife earned about $15,000. He started a snow cone business, from which he made about 5 to 7 thousand dollars. He brought the business for $2000, and paid $650 a month on season, and $400 off season. He lost the business after his detention.

Miriah and JoAnna were involved in sports. All the children have been effected by his detention. Chris is shy, and upset, and he has raised Chris since age 1. Miriah is always crying and misses him. He needs special reading classes, since he is not there to help read with him. JoAnna lives with her biological mother, since he is not there. She would prefer to live in Atlanta, and he is worried about the neighborhood in Florida, where she now lives. He can not control her since he is detained. Sharon is good woman, but they live in a bad neighborhood, where she is exposed to many things including men.

He testified that Janice is not doing well, and that she tried to commit suicide twice. She was hospitalized for a breakdown because he is not home. He calls home

twice a day to make sure that the children go to school, and get home okay. All his brothers and sisters and mom live in Florida. Prior to his detention he visited Florida to see his dad, who suffered a stroke. He died in January 1997. He has no family in Haiti. In 1996, they had a big Thanksgiving in Florida, for the entire family at a hall. There were 50 people. This was so good because it was his father's last Thanksgiving.

He is especially close to Karlie, who has helped to raise his youngest brother Jimmy. Jimmy attends Moore head College in Atlanta. Jimmy decided to go there because he (respondent), lived there and could help him. Ralph testified that he helped Jimmy, as well as Karlie's kids. Jimmy had a problem and he exercised a strong hand, verbally, to let him know that he should not get into trouble with the law. His mother is not doing well either. She feels that she is to blame, since was the one that wanted to go to Haiti to participate in a mass for he husband. His mother is like a child and needs care.

He testified that conditions in Haiti are bad, crowded, and smelly. You had to buy water, and outside of the hotel, Haiti is very bad and poor. He was shocked by what he saw. People are begging, and he could not support himself there.

He has an extensive criminal record, and he testified that he let his family down. All he wants to do now is help his family. He should be allowed to start a new life as he wants to. He regrets what he did. His entire family is here and he wants to see his daughter get married, and his sons to accomplish their goals. He has attempted to rehabilitate himself, and has serve the community. He would not repeat his mistakes as he has

a new community, and new friends. His second arrest for violating probation was a big mistake. He had no contact with that individual for over five years. While in Pensacola for Thanksgiving, he met him again and he asked for a ride. The police came behind him and he started to pull over. His friend said not to stop because there were drugs in the car. He did not know that his friend had drugs with him. The police did not prosecute him for the drugs, but violated his probation, and charged him with fleeing the police. He found out that the police had been watching his friend, and he was not involved. He has had no arrests since his release in 1994, following his probation violation.

He testified that Janice and the children would not move to Haiti if he were deported, therefore, his deportation would demolish the family. He stated that he had made bad choices in his younger years, and has tried to put that behind him. He wants to live the right life and not lie, and wants to always tell the truth. It is a life sentence if he is deported. Conditions in Haiti are bad, and it would be a tragedy for him and his wife if he were deported. She might even have another breakdown. She collapsed at work 2 months ago due to stress.

On cross examination the respondent testified that he was born in 1966, and came to this country in 1968. He understands Creole but does not speak it. His mother speaks Creole and some English. He has 6 older brothers and sisters who all speak Creole, though usually only with their mother.

He used marijuana for the first time in high school, 11th grade. He continued the use until college when he stopped. He used it almost everyday while in high

school. He never used any kind of cocaine including crack because it did not appeal to him. He sold powder cocaine beginning at age 20, while living in North Miami Beach. He purchased abut 1/8 gram and resold it in the neighborhood, to known individuals, never children. He did not consider it "selling," but simply an exchange. He did admit that he received money. He began selling crack cocaine in 1989. He did this because of a lack of money and his environment. He received crack from friends. He bought whatever he could afford. He admitted he was a drug dealer. He then began selling crack out of town. He bought drugs in North Miami Beach, and sold them in Pensacola. He took 1 oz. broke it up into $10 pieces (rock), and sold it for between $800 and $1000, for which he paid about $500. He would have someone else transport the drugs to Pensacola. Occasionally, he would sell it himself. He did this 5 or 10 times. He dealt with someone named Evelyn, last name unknown. She found him buyers. He sold at Truman Arms, a residential area at night. For abut two months in 1989 he sold drugs himself in Pensacola.

He then became a middleman supplying drugs to be sold in Pensacola. He met a Charles White who wanted the drugs. He learned that he could make a lot of money. His wife introduced him the Paula Warner, her cousin, who introduced him to Charles White. He was then questioned regarding his deposition taken in Mr. White's case ex. #19. His testimony with regard to this deposition was very unclear. He did not deny what was in the deposition, and in fact admitted that it was true., However, when asked direct questions, he was not sure of the facts. He did add certain facts. He testified that he went up to about 6 ounces, valued at between $5500

and $6500. He said that he saw Mr. White on 6 or 8 times, and paid others to take the drugs to Pensacola. Mr. Thevenin was an associate of his, who took drugs to Pensacola for him to give to Mr. White. The last time he took 17 ounces, about 581 grams, worth over $15,000. He made a couple of thousand on the deal. He does not know who the drugs were sold to. Mr. White received a 15 year sentence, while he got 5 1/2 years followed by probation.

He was concerned about his daughter JoAnna but sold drugs anyway. His daughter was in the car at the time of his arrest, and it upset her a lot. He did have a gun in the car but it was legally registered. He was sentenced to 5 1/2 years, but released in 1992. He then moved to Atlanta in March, living with his brother. Janice, Chris, and Miriah accompanied him. In November 1992, he was arrested for fleeing the police. He met a friend for no purpose, at a store, and then met him again the following morning. His friend asked for a ride to his girlfriend's house. This individual took a cab to his sister's house where he was staying. The respondent then gave him a ride. He was unable to explain why his friend did not simply take a cab to his girlfriend's house. The police stopped him and his friend, Tony told him not to stop because he (Tony) had drugs. He was scared so he did not stop immediately. His friend threw drugs out of the car. He stopped abut one block away. He was arrested released OR, and put back in jail. This hurt his family again.

When first arrested his mother visited, but was not told what actually happened. His first arrest was in 1984 for loitering, prowling, and carrying a concealed weapon. In 1985 he was arrested and plead to charges

involving marijuana, and in 1986 he plead to charges involving unlawful sale of cannabis. Both convictions were vacated. See exhibits 16 and 19.

When he was arrested for trafficking in cocaine, Janice was pregnant and he married her while in jail, and Miriam was born while he was still in jail. At the time of this arrest he was traveling with his daughter and his indicated address was that of his daughter, and her mother Sharon. He testified that he did not actually live with Sharon at that time, but that his name was on the lease.

He testified that he had no disciplinary problems in prison, or detention. The Service then introduced exhibit #21 a record of Discipline against the respondent, for smoking in unauthorized area. In addition he was transferred from Krome, after an altercation with an officer after visitation. He said that he was asked to strip for a search, and he refused because he had never been asked before. He says that he believes the officer was a homosexual. He became very upset in Court, and said that the District Director, and the Trial Attorney were treating him unfairly. He also had a problem in the cafeteria at Krome, with Carol West, who helped run the cafeteria. He testified that no one could agree with her. He said that he voluntarily left since she was not going to. He was actually disciplined for eating where he was not allowed to. He testified that everyone did it. His attitude was that this was not his fault.

He always lived with Janice after their marriage. He was asked about the one tax return which he submitted, indicated an address of 2263 Way, Atlanta, Georgia. This after he was asked where he lived in Atlanta, and he said, 2125 Willow Trail Drive, and 1127

Harbin Road. He first said, that well he stayed at different places when having problems with his wife. His wife, did not even know where that address was. Later he said the address was that of his partner, and he slept on the couch sometimes. He would spend a couple of days away, a couple of times. This tax return also shows him to be head of household, although he was actually married. He testified that his accountant filed it out, but interestingly, the page containing the preparers name, and his signature was not supplied. He filed separately because did not want to mix his business with his personal affairs. He testified that he has been mistreated by the Service, and that they should have released him.

Counsel for the respondent subpoenaed officers of the Immigration Service from Krome to testify regaring his behavior at Krome. The Court signed these, and the officers were available. However, after talking to these individuals., counsel elected not to call them.

The respondent has applied for Cancellation of Removal pursuant to section 240A(a) the Act. This section allows the judge to waive all grounds of inadmissibility, for an alien who has been a lawful permanent resident for 5 years, and has resided lawfully in the United States for seven years, prior to the commission of the acts which subject him to removal from the United States, and has not been convicted of an aggravated felony. This relief is discretionary in nature.

While the Court has found the respondent statutorily ineligible for the relief because he has been convicted of an aggravated felony, a full hearing was held based on the Board's remand. Even if statutorily eligible for the relief, the respondent still must demonstrate that he

merits, the relief as a matter of discretion. In *Matter of C-V-T-*, Int. Dec. 3342 (BIA 1998), the Board held that the standards developed to evaluate a waiver under the old section 212(c), are appropriate for the exercise of discretion under section 240A(a). The burden remains on the respondent to demonstrate that he merits the relief. The Court must balance the favorable factors, including, residence of long duration, hardship to the respondent or her family, property or business ties, service in the armed forces, service of value to the community, and any other factors attesting to her good moral character, against the adverse factors including the nature of the immigration violation, any criminal record, or other evidence of bad moral character. *Matter of Marin* 16 I&N Dec. 581 (BIA 1978). *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), *Matter of Bascom*, 19 I&N Dec. 628 (BIA 1988).

In *Matter of Marin*, supra., the Board laid out the positive factors including residence of long duration, hardship to family member, business ties, property ties, employment and evidence of community service. In the instant case the respondent has resided in the United States for 30 years, having entered the United States an infant. He has extensive family, and business ties in the United States, even though there is no proof of taxes regarding these business.

The positive factor of his residence in the United States and family ties, must be balanced against the adverse factors, including her criminal and immigration record. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), *Matter of Bascom*, 19 I&N 628 (BIA 1988). The respondent's serious criminal conviction for trafficking in

cocaine requires outstanding or unusual equities as set out in *Matter of Buscemi*. The Service does not contest the fact that his residence, of 30 years since an infant is an outstanding equity. The Court concurs in this finding. However, a finding of outstanding equities does not automatically require that the relief be granted.

In the instant case the respondent has admitted, and the evidence establishes, that he was a drug dealer over along period of time. Even after being convicted he violated probation by associating with a friend involved with drugs. The serious adverse effects of drugs in this country has been noted by the Board in *Matter of U-M-*, 20 I&N Dec. 327, 330 (BIA 1991). The Board said, "The harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has dawn between drug offenses and other crimes." The definition of an "aggravated felony" under 101(a)(43), makes drug trafficking an aggravated felony, without any sentence, while many other crimes require a sentence of one year or more. The respondent no only has one conviction, but admits having been earning his living by selling drugs for a substantial period of time. This factor alone is enough to deny the relief as a matter of discretion.

The Court also finds that there are other discretionary factors, which must be considered. The respondent does have extensive family ties to this country, and would have a difficult time in Haiti. However, while his direct testimony was very moving, on cross examination his true colors came through. He testified on direct that he wants to live a true life with no lies. However on cross examination, he denied any discipli-

nary problems in jail or at Krome, when in fact he had more than one. While they may be minor offenses, he did not reveal them when asked. In addition he submitted only one tax return, and that was incomplete. This return also contains misinformation, in that he does not indicate that he was married. This may have resulted in a lower tax. He testified regarding his many businesses, but has produced no evidence, specifically tax returns relating to these businesses. His one return shows gross income of $27,180 from Exclusive Touch, yet he testified that he had 8 to 10 employees. There was a snow cone business with no evidence of a tax return. His own witness Mr. Clark testified that he paid the respondent $6,000 per year for cleaning 5000 square feet, and the Mr. Richardson had other customers, one of over 50,000 square feet. He has produced no evidence that this income was reported.

In addition, on direct examination he paints a picture of the ideal family. When confronted with his tax return indicating a different address, he says, that he spent time away from Janice when he had problems. He finally stated that the address was that of a partner where he sometimes slept on the couch. His explanation of what happened when he violated probation does not ring true. His friend Tony takes a cab to his sister in laws house, to ask for a ride to his girlfriend's house. His wife testified she did not want him to go because they were heading home to Atlanta. She also testified that he was suppose to take Tony to his hotel. It was not clear as to why they simply did not take Tony in the car and drop him off before heading for Atlanta. He also was unable to explain why if he had no knowledge of the drugs, he simply did not stop and explain this.

While the respondent's drug conviction in the 1980s were vacated in 1999 , the fact remains that at one point he plead to these charges, and now admits that he was doing drugs at that time. He has a long history of using and selling drugs. These cases must be considered in deciding whether to grant the relief as a matter of discretion.

In conclusion while the respondent has extensive family ties, and he and his family would suffer greatly if he were deported, he does not merit a waiver pursuant to section 240A(a) of the Act as a matter of discretion

Since the respondent has waived any other forms of relief the following orders will be issued:

It is hereby **ORDERED** that the Respondent's application for Cancellation of Removal pursuant to section 240A(a) of the Act be **DENIED**.

It is **FURTHER ORDERED** that the Respondent be REMOVED from the United States pursuant to sections 212(a)(2)(C), 212(a)(2)(A)(i)(II), and 212(a)(2)(B) of the Act.

Dated this 15th day of November 1999

KENNETH S. HUREWITZ
Kenneth S. Hurewitz
United States Immigration
Judge

[Seal Omitted]

US Department of Justice
Immigration and Naturalization Service

Miami District Office
7880 Biscayne Boulevard
Miami, Florida 33138

July 22, 1999

Ralph Richardson
C/O US INS
Krome Service Processing Center

Dear Mr. Richardson:

Please be advised that the Service has determined that you may be paroled from Service custody upon the posting of a bond in the amount of twenty-five thousand dollars ($25,000). This decision may not be appealed. If bond is posted in your behalf, the following conditions will apply:

- You present yourself at any and all immigration hearings concerning your case
- You advise EOIR and this office in writing of any change in residence within 5 days
- You present yourself at any and all requests of the INS
- You comply with any decisions made concerning your case

If you fail to comply with these conditions, the bond posted in your behalf may be breached.

Sincerely

SIGNATURE ILLEGIBLE
For Leroy Frederick
Assistant District Director
Detention and Deportation

Ralph Richardson File No: A 17 566 876

Date: JUL 20 1999

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the Immigration Judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

☐ detained in the custody of this Service.

☒ released under bond in the amount of $25,000.00.

☐ released on your own recognizance.

"Custody determination review based on the change in interpretation of Section 303(b)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)"

☒ You may request a review of this determination by an Immigration Judge.

☐ You may not request a review of this determination by an Immigration Judge because the Immigration and Nationality Act prohibits your release from custody.

/s/ CONSTANCE K. WEISS
(Signature of authorized officer)

Constance K. Weiss, Deputy ADD/DD&P
(Title of authorized officer)

Miami, Florida
(INS office location)

☐ do ☐ do not request a redetermination of this custody decision by an Immigration Judge.

☒ I acknowledge receipt of this notification.

ILLEGIBLE SIGNATURE (Signature of respondent) 7/21/99 (Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director

☐ Board Of ImmigrationAppeals

The results of the redetermination/reconsideration are:

☐ No change - Original determination upheld
☐ Detain in custody of this Service.
☐ Bond amount reset to _____
☐ Release - Order of Recognizance.
☐ Release - Personal Recognizance.
☐ Other: _____

_____
(Signature of officer)

[Seal Omitted]

US DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

18201 SW 12th Street
Miami, Florida 33194

July 26, 1999

TO: Ralph Richardson, A 17 566 876
Krome Service Processing Center, Miami, FL

FROM: Edward A. Stubbs
Officer in Charge
Krome Service Processing Center

SUBJECT: Change in custody conditions, revocation of immigration bond

Dear Mr. Richardson,

Due to the recent receipt by the Service of unsealed certified records of convictions acquired from the State of Florida, which impacts heavily on your immigration status, your case has been reconsidered and your release on bond is no longer warranted.

Be advised that the previous bond of $25,000.00 is hereby revoked.

/s/ EDWARD A. STUBBS
Edward A. Stubbs,
Office in Charge, Krome SPC